93-559

No. _____

Supreme Court, U.S.
FILED
OCT - 4 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,

Petitioner,

vs.

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,

Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals
for the Tenth Circuit

GALE A. NORTON*
Attorney General of Colorado
TIMOTHY M. TYMKOVICH
Solicitor General
PAUL FARLEY
Deputy Attorney General
ANTONY B. DYL
First Assistant Attorney General
WILLIAM E. THRO
Assistant Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5680

REX E. LEE
Special Assistant Attorney General
2840 Iroquois Drive
Provo, Utah 84604
Telephone: (801) 373-3342

ATTORNEYS FOR THE PETITIONER

***Counsel of Record**

QUESTIONS PRESENTED

1. Whether Title IX proscribes only intentional gender-motivated discrimination or whether it requires that the gender composition of a university's athletic programs mirror that of its student body.

2. Whether a federal court exceeds its authority to remedy a violation of Title IX by ordering a university immediately and permanently to reinstate a specific athletic program, rather than permitting a university to determine what athletic programs should be continued to eliminate the statistical imbalance.

TABLE OF CONTENTS

PAGE

QUESTIONS PRESENTED i

OPINIONS BELOW 2

JURISDICTION 2

STATUTE INVOLVED 2

STATEMENT OF THE CASE 3

REASONS FOR GRANTING THE PETITION 13

I. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT. 13

A. THE HOLDING OF THE COURT BELOW, THAT A VIOLATION MAY BE FOUND WITHOUT PROOF OF INTENTIONAL DISCRIMINATION, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT. . 15

B. THE HOLDING OF THE COURT BELOW, THAT AN AGENCY MAY IMPOSE TITLE IX LIABILITY ON THE BASIS OF DISPARATE IMPACT EVEN THOUGH TITLE IX PRECLUDES DISPARATE IMPACT LIABILITY, CONFLICTS WITH THIS

TABLE OF CONTENTS

PAGE

COURT'S NARROW HOLDING IN *GUARDIANS ASS'N V. CIVIL SERVICE COMM'N.* 17

C. BY IMPOSING A REMEDIAL SCHEME WHICH DENIES ANY INSTITUTIONAL DISCRETION AND WHICH MANDATES THE PERMANENT ADDITION OF A PARTICULAR SPORT, THE COURT BELOW CONTRADICTED THE RULE OF THE FIRST CIRCUIT. 21

II. THE HOLDING OF THE COURT BELOW HAS PROFOUND IMPLICATIONS FOR EVERY EDUCATIONAL INSTITUTION WHICH SPONSORS INTERCOLLEGIATE OR INTERSCHOLASTIC SPORTS. 24

CONCLUSION 29

APPENDIX A A-1

APPENDIX B B-1

APPENDIX C C-1

APPENDIX D D-1

TABLE OF AUTHORITIES

CASES **PAGE**

Alexander v. Choate, 469 U.S. 287 (1985) 15, 18

Blair v. Washington State Univ., 108 Wash. 2d 558 P.2d 1379 (1987) 8

Cannon v. University of Chicago, 441 U.S. 677 (1979) 6

Cannon v. University of Chicago, 648 F.2d 1104 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981) 15

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 20

Cohen v. Brown Univ., 991 F.2d 888 (1st Cir. 1993) . . . 16, 21, 22

Connecticut v. Teal, 457 U.S. 440 (1982) 20

Cook v. Colgate Univ., 802 F. Supp. 737 (N.D. N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993) 12

Debra P. v. Turlington, 644 F.2d 397 (5th Cir. 1981) 20

Favia v. Indiana Univ. of Pennsylvania, 812 F. Supp. 578 (W.D. Pa. 1993) 16

Griggs v. Duke Power Co., 401 U.S. 424 (1971) 16

Grove City College v. Bell, 465 U.S. 555 (1984) 15

Guardians Ass'n v. Civil Service Comm'n of New York, 463 U.S. 582 (1983) 14, 15, 17, 18, 20

TABLE OF AUTHORITIES

CASES PAGE

Hazelwood School Dist. v. United States, 433 U.S. 299 (1977) . . 20

Kelley v. Board of Trustees of the Univ. of Illinois, ___ F. Supp. ___, 1993 WL 334771 (C.D. Ill. Sept. 1, 1993) 27, 28

Mabry v. State Bd. of Community Colleges & Occupational Educ., 813 F.2d 311 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987) . 16

Missouri v. Jenkins, 495 U.S. 33 (1990) 23

Pasadena City Bd. of Educ. v. Spangler, 427 U.S. 424 (1976) . . 22

Sharif v. New York State Educ. Dep't., 709 F. Supp. 345 (S.D.N.Y. 1989) 16

St. Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993) 15

Watson v. Fort Worth Bank & Trust, 487 U.S. 977 (1988) 21

STATUTES

20 U.S.C. § 1401 *et seq.* 25

20 U.S.C. § 2701 *et seq.* 25

20 U.S.C. § 2911 *et seq.* 25

20 U.S.C. § 2982 *et seq.* 25

TABLE OF AUTHORITIES

STATUTES **PAGE**

20 U.S.C. § 3171 *et seq.* 25

20 U.S.C. § 1681 2

20 U.S.C. § 1681(a) 15, 27

20 U.S.C. § 1681(b) 11, 18

20 U.S.C. § 1682 4

20 U.S.C. § 1687 3

28 U.S.C. § 1254(1) 2

42 U.S.C. § 2000d 15

42 U.S.C. § 2000e-2(k) 16

Colo. Rev. Stat. § 23-30-108 3

FEDERAL REGULATIONS

24 CFR § 1.4(b)(vii)(2)(i) 18

34 CFR Part 106 . . . . . 4, 6

34 CFR § 106.41(c) 6

TABLE OF AUTHORITIES

FEDERAL REGULATIONS **PAGE**

34 CFR § 106.41(c)(1) 7

34 CFR § 106.41(d) 25

OTHER AUTHORITIES

Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Final Regulation, 40 Fed. Reg. 24128 (1975) 19

Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, Proposed Rule, 39 Fed. Reg. 22228 (1974) 19

Komer, *Deputy Assistant Secretary's Memorandum of April 15, 1991, Concerning Technical Assistance Documents for Title IX Intercollegiate Athletics National Enforcement Strategy* . . 24

NCAA, *Gender Equity Study: Summary of Results* (1992) 20

NCAA, *Preliminary Report of the Task Force on Gender Equity* (1993) 14

NCAA, *Revenues and Expenses of Intercollegiate Athletics Programs; Analysis of Financial Trends and Relationships, 1985 - 1989* (1989) 13

Office for Civil Rights, *Title IX Athletics Investigators' Manual*

OTHER AUTHORITIES **PAGE**

(1990) 9, 11

Proposed Policy Interpretation, 43 Fed. Reg. 58070 (1978) 19

Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. (1971) . . 15

Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71413 (1979) 7, 8, 23

No. _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1993

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the governing board of the Colorado State University,
Petitioner,
vs.
JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE AINSWORTH, and LISA MIZE, in their individual capacities,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Tenth Circuit

The Colorado State Board of Agriculture, in its capacity as governing board of the Colorado State University, through its counsel, the Attorney General of Colorado, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit is published at 998 F.2d 824 (10th Cir. 1993), and is reprinted at C-1 - C-24 of the appendix hereto. The opinion of the United States District Court for the District of Colorado is published at 814 F. Supp. 1507 (D. Colo. 1993), and is reprinted at App. A-1 - A-22. Subsequent orders of that court are contained in the transcript of the status conference of March 11, 1993 and are not otherwise published. The transcript of the status conference is reprinted at App. B-1 - B-27.

JURISDICTION

The court of appeals entered judgment on July 7, 1993. No petition for rehearing was filed. Petitioner invokes the jurisdiction of this Court pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Title IX of the Education Amendments of 1972 as amended, codified at 20 U.S.C. § 1681, provides in relevant part:

> (a) **Prohibition against discrimination; exceptions.** No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . ..
>
> (b) **Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance**. Nothing contained in subsection (a) of this section shall be

> interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community . . ..

STATEMENT OF THE CASE

Petitioner, the Colorado State Board of Agriculture ("Board"), is charged under Colorado law with responsibility for the governance of the Colorado State University ("CSU"). *See* Colo. Rev. Stat. § 23-30-108. CSU is a state-supported land-grant institution providing higher education. CSU is located in Fort Collins, Colorado and is attended by approximately 15,000 full-time students. Because CSU receives federal funds for some purposes, it is subject to the requirements of Title IX of the Education Amendments of 1972. *See* 20 U.S.C. § 1687.

Like most universities, CSU has chosen to sponsor a number of intercollegiate sports teams. CSU's teams compete at the National Collegiate Athletic Association ("NCAA") Division I-A level, the highest level of competition and the level with the most athletic scholarships. Prior to 1970, CSU offered eleven intercollegiate sports for men, but none for women. App. at C-13. During the 1970s, CSU created eleven teams for women and reduced the number of men's teams to ten. *Id.*

Since 1980, budget constraints have necessitated across-the-board reductions in CSU's intercollegiate sports programs. Thus, by

the 1988-89 academic year, CSU had teams in eight men's sports[1] - and nine women's sports.[2] *Id.* at A-12. In that year, the United States Department of Education's Office of Civil Rights ("OCR"), the federal agency charged with administering Title IX,[3] terminated monitoring of CSU's athletic department that had begun in 1983, because CSU had "achieved compliance with Title IX . . . and its implementing regulation, 34 CFR Part 106."[4]

Despite ongoing budget concerns, no further intercollegiate teams were dropped until June 1, 1992. *See* App. at A-21. At that time, the President of CSU, Dr. Albert Yates, after consultation with CSU's Title IX coordinator, accepted the athletic department's budget-motivated recommendation that the men's baseball program (55 participants) and the women's softball program (18 participants) be discontinued. Dr. Yates' decision was ratified by the Board.

After implementing the decision to discontinue baseball and softball, CSU continued to sponsor *more* women's sports (8) than

---

[1] CSU fielded men's varsity teams in baseball, basketball, cross country, football, golf, indoor track, outdoor track, and tennis.

[2] CSU fielded women's varsity teams in basketball, cross country, golf, indoor track, outdoor track, tennis, softball, swimming, and volleyball.

[3] The Department of Education is responsible for granting most of the federal financial assistance to educational institutions, and it may, after notice and an opportunity by the institution to achieve voluntary compliance, terminate federal funding of an institution violating Title IX. *See* 20 U.S.C. § 1682. Title IX also gives the Education Department authority to promulgate Title IX regulations. *Id.*

[4] *See* March 8, 1989 letter from Gilbert D. Roman, Regional Director of the Office for Civil Rights, to Dr. Philip E. Austin, President of CSU (App. D-1 - D-3) (praising CSU's intercollegiate program as one of which CSU "can be proud"). The letter and OCR's monitoring and approval of CSU's athletic programs are described in detail in the district court's opinion. *See* App. A-13 - A-16.

men's sports (7). And because baseball had 55 participants and softball only 18 participants, the net effect of these latest athletic department reductions was to *increase* the female athletic participation rate relative to male participation.[5] Moreover, after achieving certain reductions in its overall athletic department budget deficit, CSU targeted the remainder of the savings from discontinuing baseball and softball to increasing scholarships in other *women's* sports.[6] Given that OCR had found full compliance in 1989 and that the net effects were positive for women, there was every reason to believe that these cuts did not violate Title IX.

Despite the fact that CSU's decision how best to meet its athletic department budget constraints clearly favored female athletes relative to their male counterparts, on June 29, 1992, respondents, members of CSU's 1991-92 women's softball team, brought this suit, in their individual capacities, in the United States District Court for the District of Colorado challenging the university's action as discriminatory under Title IX. Respondents sought both damages and injunctive relief.[7]

---

[5] During the 1988-89 academic school year, the gap between women's athletic participation and enrollment rates at CSU was 15.6 percentage points. App. A-12. By 1991-92, that gap had fallen to 12.7 percentage points. *Id.* at A-7. Termination of baseball and softball in 1992 further *decreased* the gap between women's participation and enrollment at CSU to 10.5 percentage points (women comprised 48.2% of the student body and 37.7% of the student-athletes). *Id.*

[6] Specifically, CSU intended to increase the number of women's scholarships in golf, tennis, and the three track sports (cross country, indoor track, and outdoor track) to the maximum level allowed by the NCAA.

[7] The suit was initially filed against CSU by seven of the thirteen respondents. The complaint sought only injunctive relief. Shortly thereafter, the Board was added as a defendant. On September 25, 1992, the six remaining respondents were added as plaintiffs in an amended complaint which for the first time sought damages. Trial on the issue of liability was held in November 1992, App. at A-2, and the parties subsequently settled

Respondents did not allege intentional discrimination. Nor did they rely on the language of Title IX itself. Rather, they contended that CSU's decision to discontinue its softball program violated the implementing regulation, 34 CFR Part 106, with which OCR had found CSU in full compliance only three years earlier. Specifically, respondents alleged a violation of a portion of the regulation's command that federal fund recipients "provide equal athletic opportunities for members of both sexes," 34 CFR § 106.41(c), notwithstanding the fact that women now have a *greater* share of the athletic opportunities at CSU than in 1989 when CSU's athletic program was approved by OCR (and also a greater share than prior to the changes that triggered this litigation).

On February 18, 1993, the district court, citing only CSU's "violation" of *one* of ten nonexclusive factors that the implementing regulations instruct *OCR*[8] to "consider" in determining whether equal athletic opportunities are available (and thus whether to take action with respect to a recipient's federal funding) found CSU in violation of Title IX.[9] In so holding, the court rejected the Board's argument

---

the damages claims.

[8] The implementing regulations were promulgated in 1975, long before this Court held that there was an implied private right of action under Title IX. *See Cannon v. University of Chicago*, 441 U.S. 677 (1979).

[9] 34 CFR § 106.41(c) provides in relevant part:

> **(c) Equal Opportunity**. A recipient . . . shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director [of OCR] will *consider*, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;
> (2) The provision of equipment and supplies;
> (3) Scheduling of games and practice time;

that a private Title IX plaintiff must at a minimum prove an overall violation based upon *all* of the factors the implementing regulation directs OCR to consider. App. A-35 (relying on OCR's "Title IX Athletics' Investigator's Manual," which notes that in "unique circumstances" "an [agency] investigation may be limited").

The court based its conclusion that CSU had "violated" the administrative consideration in question -- "[w]hether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes," 34 CFR § 106.41(c)(1) -- on a 1979 OCR "Policy Interpretation." *See Title IX of the Education Amendments of 1972; A Policy Interpretation; Title IX and Intercollegiate Athletics*, 44 Fed. Reg. 71413 (1979). The Policy Interpretation provides that *OCR*[10] may assess whether an institution

---

(4) Travel and per diem allowance;
(5) Opportunity to receive coaching and academic tutoring;
(6) Assignment and compensation of coaches and tutors;
(7) Provision of locker rooms, practice and competitive facilities;
(8) Provision of medical and training facilities and services;
(9) Provision of housing and dining facilities and services;
(10) Publicity.

> Unequal aggregate expenditures . . . for male and female teams . . . will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

(emphasis added).

[10] The *Policy Interpretation*, which was promulgated by the Department of Education's predecessor agency, the Department of Health, Education and Welfare, was also proposed before this Court held that there was an implied private right of action under Title IX.

"effectively accommodates" interests and abilities "in any one of the following ways: (1) participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments"; or (2) "the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the under-represented sex"; or (3) "it can be demonstrated that the interests and abilities of the members of the [under-represented sex] have been fully and effectively accommodated." 44 Fed. Reg. at 71418.

The district court, treating this excerpt from the Policy Interpretation as a rigid three-part test for Title IX compliance in private suits, held as a matter of law that because CSU had a 10.5% "gap" between female athletic participation and female undergraduate enrollment -- a gap approximately *half* that of the *average* NCAA Division I-A institution, (and only two-thirds the size of the gap at CSU five years earlier), -- participation opportunities at CSU were not "substantially proportionate." App. A-9 - A-10. The court acknowledged that it made this finding notwithstanding the fact that the female athletic participation rate at Colorado high schools, the pool from which CSU draws most of its varsity athletes, differed only slightly from the rate at CSU. *Id.* at A-15. With regard to the relative level of female participation that *would* achieve "substantial proportionality," the court noted only that a 1.7% gap might be "acceptable." *Id.* at A-20. Currently, there is only *one* NCAA Division I-A institution *in the entire country* with a significant female enrollment, Washington State University, where there is such close parity between female participation in intercollegiate athletics and female undergraduate enrollment.[11]

---

[11] Tr. at 796 (Testimony of Dr. Lopiano). Moreover, Washington State University reached parity after the Washington Supreme Court interpreted the Washington Constitution as mandating statistical parity between athletic participation and enrollment rates. *See Blair v. Washington State Univ.*, 108 Wash. 2d 558, 740 P.2d 1379 (1987).

The court also held that CSU could not demonstrate a "continuing practice of program expansion," because CSU's intercollegiate athletic programs, like those of most universities, had expanded dramatically in the 1970s but had been shrinking in recent years in response to significant budgetary constraints, thereby decreasing the total number of athletic opportunities for *both* male and female student-athletes. App. at A-11. Finally, respondents' own testimony "about their dedication to the sport of softball," *id.* at A-17, convinced the court that the athletic interests and abilities of CSU students -- namely the respondent softball players themselves -- were not being "fully and effectively accommodated." *Id.* at A-20.[12]

Thus, by taking a budgetary action, which was in no way motivated by gender, and which actually *favored* female student-athletes relative to their male counterparts, CSU was held to have discriminated against women in violation of Title IX. The district court refused even to consider evidence of CSU's good faith and the lawful motivations underlying its decision to terminate baseball and softball, because "good intentions . . . do not negate a violation of Title IX." App. at A-21.

Further, although neither Title IX, the implementing regulations, the *Policy Interpretation*, nor even the OCR "*Investigators' Manual*" in any way suggests that compliance with Title IX *ever* requires an educational institution to sponsor a team in any particular sport, the district court issued an injunction directing the Board immediately and permanently to reinstate the women's softball program with all of the benefits accorded other varsity

---

[12] In addition to these findings with respect to softball, the district court *sua sponte* found unaccommodated interest sufficient to justify adding women's soccer and alpine skiing teams at CSU. App. at A-19-A-20.

teams.[13]

The court of appeals affirmed in all relevant respects.[14] The court expressly rejected the Board's argument that a Title IX plaintiff must prove that the challenged action was motivated by impermissible gender-based considerations. App. at C-18 - C-19. Instead, the court held that proof of disparate impact alone is sufficient to place an affirmative duty on an educational institution to favor members of the "under-represented sex," either by continually adding new teams for the under-represented sex or by providing intercollegiate athletic opportunities for *100%* of the willing and able members of that sex (regardless of what portion of willing and able members of the over-represented sex receive such opportunities). *Id.* at C-10 - C-17.

The court acknowledged that Congress expressly provided that:

---

[13] The district court subsequently ordered the Board to: (1) appoint immediately an interim head coach; (2) complete the selection process for a permanent head coach on or before June 1, 1993; (3) begin active recruiting of softball players so that CSU could have a "competitive" or "first class" varsity team; and (4) schedule a fall exhibition season. *See, e.g.*, App. at B-5 - B-6 ("THE COURT: Well, I had a really good idea driving home last night. It seems to me that I heard . . . that the baseball coach was . . . still a CSU employee. What about the baseball coach being acting [softball] coach"); *Id.* at B-15 ("THE COURT: . . . We've already talked about the insurance and the coach and the fall season and the contact of Mr. Mason to see if he can fill in and get some recruiting started . . .. I really would like you to rethink this idea of the playing field").

[14] Although the court of appeals found that the district court should not have placed the burden of proving "effective accommodation" on CSU, it affirmed the district court's finding on that issue after reconsidering the record itself "placing the burden of proof on the plaintiffs." App. C-14 - C-15. The court of appeals reversed only the order that CSU schedule a fall softball exhibition season, and emphasized that, while the recruiting ordered by the district court did have to take place, the softball team did not have to be "competitive" or "top flight." *Id.* at C-23.

> [n]othing contained in [Title IX] shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in . . . any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community. . . .

20 U.S.C. § 1681(b). Nevertheless, relying on its interpretation of the implementing regulations, as informed by the OCR *Policy Interpretation* and the OCR *Investigator's Manual*, the court concluded that a statistical imbalance *can* violate Title IX and subject the defendant to injunctive relief expressly designed to reduce the imbalance. App. at C-10 - C-11 ("Because an institution is not required to maintain gender balance, it is fair to conclude that proving an imbalance lies with the plaintiff").

The court of appeals also agreed with the district court that the administrative considerations listed in the implementing regulation could be turned into a "test," and that an institution may violate Title IX simply by failing to "comply" with *one* of those considerations. App. at C-7 - C-8. Then, following the district court's lead, the court of appeals found that CSU's "violation" of the three-part "Effective Accommodation test" outlined in the *Policy Interpretation* as a means of assessing compliance with one of the administrative considerations established an irrebuttable presumption that the university was in violation of Title IX. *Id.* at C-10 - C-17.

The court recognized that in these "times of economic hardship, few schools will be able to satisfy [Title IX] by continuing to expand their women's athletic programs." *Id.* at C-13. Indeed, the court noted, the only solution open to schools with limited athletic department budgets is to *cut* their existing men's programs until substantial parity is reached. *Id.* The court made clear, however, that budget cuts at institutions which do not presently have parity

between female athletic participation and enrollment -- *i.e. all* educational institutions -- can *never* include women's teams, because any such cuts would automatically establish unaccommodated interests and abilities (namely, those of the displaced athletes) in violation of Title IX.[15] Thus, the current rule in the Tenth Circuit is that notwithstanding any other relevant and even compelling considerations, no school which has not achieved strict proportionality may never discontinue a women's program for any reason. This is true even if the net effect of the total change proposed by the school improves proportionality.

Finally, although it acknowledged that there are several ways of correcting a violation of Title IX, the court of appeals determined that once a violation is established, a district court is free to disregard the university's judgment as to which path to "substantial proportionality" best serves the particular needs and circumstances of that institution and to *mandate* a particular corrective course of action. Specifically, the court of appeals upheld the district court's order that CSU immediately and permanently establish a women's intercollegiate softball team and recruit women to attend CSU in future years for the purpose of playing softball.

---

[15] Indeed, the court indicated that interest and ability in an intercollegiate sport may exist whenever there is a club sport or where there has been a team in the past. *Id.* at C-16. *See also Cook v. Colgate Univ.*, 802 F. Supp. 737 (N.D. N.Y. 1992), *vacated as moot*, 992 F.2d 17 (2d Cir. 1993).

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT BELOW IS IN CONFLICT WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

This case presents issues of pressing and recurring importance to thousands of higher educational institutions and high schools across the country. Most such institutions, both state and private, have chosen to sponsor and fund intercollegiate or interscholastic athletic programs for their students. The primary mission of educational institutions is education, however, and, in the face of budgetary constraints, many have found it necessary in recent years to scale back their extracurricular offerings, including intercollegiate or interscholastic sports.[16]

At issue here is what discretion Title IX leaves an educational institution in tailoring its intercollegiate or interscholastic athletic program, within budgetary limitations, to the specific interests and abilities of its student-athletes. Clearly, Title IX places some restrictions on that discretion; the plain language of the statute prohibits an institution from discriminating in favor of -- that is, intentionally preferring -- student-athletes of one gender. What impact, if any, Title IX has beyond such gender-motivated decisions, however, remains unresolved. Specifically, the question whether a Title VII-type statistics-based "disparate impact" theory is available to private Title IX plaintiffs has fostered considerable confusion and conflict among the lower courts, and the decision below adds to an existing conflict among the circuits on that issue.

---

[16] Over 65% of college athletic departments operate at a loss. NCAA, *Revenues and Expenses of Intercollegiate Athletics Programs; Analysis of Financial Trends and Relationships, 1985 - 1989*, 54, Table 4-2 (1989).

Moreover, because the court of appeals looked to Title IX's implementing regulations as alternative authority for its disparate impact theory, this case also raises a broader recurring issue with significant implications that reach beyond Title IX: the circumstances, if any, under which a federal agency may proscribe, as discriminatory, conduct which the statute itself does not prohibit. *See Guardians Ass'n v. Civil Service Comm'n of New York*, 463 U.S. 582 (1983). The decision below extends the scope of agency (and judicial) authority in this regard beyond that recognized in prior decisions, and this Court should grant the petition to fix the limits of this controversial doctrine both in the Title IX context and elsewhere.

The decision below also creates a conflict among the circuits with regard to whether a federal court exceeds its authority to remedy a statistics-based violation of Title IX by ordering a university to sponsor and fund a particular athletic program rather than permitting the university itself to choose how to modify its mix of sports offerings to eliminate the statistical imbalance declared unlawful by the court. Because issues of state-federal relations and academic freedom are implicated, this conflict alone warrants granting the petition.

These issues are of exceptional importance. Despite devoting enormous time and resources to questions of Title IX compliance -- including, as in the Board's case, hiring special Title IX compliance officers[17] -- educational institutions currently have no way to determine which, if any, approaches to managing their limited budgets will shield them from costly and intrusive monetary and equitable Title IX penalties. This uncertainty both creates perverse incentives and fosters absurd results antithetical to the purposes underlying Title IX.

---

[17] *See also* NCAA, *Preliminary Report of the Task Force on Gender Equity* (1993).

A. THE HOLDING OF THE COURT BELOW, THAT A VIOLATION MAY BE FOUND WITHOUT PROOF OF INTENTIONAL DISCRIMINATION, CONFLICTS WITH THE DECISIONS OF OTHER CIRCUITS AND WITH THE DECISIONS OF THIS COURT.

As this Court recently noted in *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2751 (1993), federal courts have no authority to impose liability under a federal antidiscrimination law unless the defendant "*has unlawfully discriminated*." (emphasis original). "Unlawful discrimination" generally has proven difficult to define, however, and the lower courts have reached conflicting conclusions regarding the conduct proscribed by Title IX.

Title IX states simply that no individual may be excluded from a federally funded program "on the basis of sex." 20 U.S.C. § 1681(a). In *Cannon v. University of Chicago*, 648 F.2d 1104, 1109 (7th Cir.), *cert. denied*, 454 U.S. 1128 (1981), the Seventh Circuit held that "a violation of [Title IX] requires an intentional discriminatory act and that disparate impact alone is not sufficient to establish a violation." Similarly, this Court has interpreted its decision in *Guardians* as holding that a virtually identical provision of Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, "reache[s] only instances of intentional discrimination." *Alexander v. Choate*, 469 U.S. 287, 293 (1985).[18]

---

[18] "Title IX was patterned after Title VI of the Civil Rights Act of 1964." *Grove City College v. Bell*, 465 U.S. 555, 566 (1984). *See also* Sex Discrimination Regulations: Hearings Before the House Subcommittee on Post Secondary Education of the Committee on Education and Labor, 94th Cong., 1st Sess. 16, 150 (1971) ("the setting up of an identical administrative structure and the use of virtually identical statutory language substantiates the intent of Congress that the interpretation of Title IX was to provide the same coverage as had been provided under Title VI")

The court below expressly rejected this approach. "[D]espite the fact that Title IX was explicitly modeled on Title VI," the court held that "Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e [*et seq.*], 'is the most appropriate analogue when defining Title IX's substantive standards.'" App. at C-18 - C-19 (*quoting Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987)). Because proof of discriminatory intent is not required under Title VII, *see Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971); 42 U.S.C. § 2000e-2(k), the court reasoned, a statistics-based cause of action for disparate impact is also available under Title IX. App. at C-18.[19]

The First Circuit has also recently weighed in on the issue, and its approach appears to fall somewhere in between the diametrically opposed approaches of the Seventh and Tenth Circuits. *See Cohen v. Brown Univ.*, 991 F.2d 888 (1st Cir. 1993). Although that court failed to follow the Seventh Circuit's lead by requiring Title IX plaintiffs to prove discriminatory intent, it also eschewed the Title VII "pure disparate impact" model adopted by the Tenth Circuit. Instead, the First Circuit held that "a Title IX plaintiff . . . must accompany statistical evidence of disparate impact with some further evidence of discrimination . . .." *Id.* at 895.[20]

(Comments of Senator Bayh).

[19] *See also Favia v. Indiana Univ. of Pennsylvania*, 812 F. Supp. 578 (W.D. Pa. 1993); *Sharif v. New York State Educ. Dep't.*, 709 F. Supp. 345, 360 (S.D.N.Y. 1989).

[20] The court specifically identified an "unmet need amongst the members of the disadvantaged gender." *Id* at 895. The court, however, failed to explain how proof of *some* "unmet need" among members of the under-represented gender in any way evidences "discrimination," since there could well be as much or more unmet need among members of the other gender. And a comparison of the relative levels of unmet need (which the court expressly rejected, *id.* at 899) would merely be additional disparate impact

There is a square conflict among the circuits on the issue of whether Title IX bars only intentional discrimination or whether it places upon educational institutions affirmative obligations to ensure that the gender composition of their athletic departments mirror the gender compositions of their student bodies. The importance of this issue is significant; it affects virtually every educational institution in the country. These schools face the imponderable task of deciding how to allocate their limited resources in a manner that complies with Title IX and the judicial gloss applied by the Seventh, Tenth and First Circuits. Accordingly, this important question of federal law should be settled by the Court. *Cf. Guardians*, 463 U.S. at 597 (White, J., plurality) ("[s]ince the private cause of action . . . is one implied by the judiciary rather than expressly created by Congress, we should . . . take care in defining the limits of this cause of action").

B. THE HOLDING OF THE COURT BELOW, THAT AN AGENCY MAY IMPOSE TITLE IX LIABILITY ON THE BASIS OF DISPARATE IMPACT EVEN THOUGH TITLE IX PRECLUDES DISPARATE IMPACT LIABILITY, CONFLICTS WITH THIS COURT'S NARROW HOLDING IN *GUARDIANS ASS'N V. CIVIL SERVICE COMM'N.*

Because the court of appeals looked to Title IX's implementing regulations as alternative authority for upholding the district court's disparate impact judgment against the Board, this case also raises a broader recurring issue with significant implications that reach beyond Title IX: the circumstances, if any, under which a federal agency may

---

evidence. Nor did the court explain how "unmet need" constitutes an additional hurdle for Title IX plaintiffs, since the mere existence of the displaced plaintiff student-athletes presumably establishes "unmet need."

proscribe, as discriminatory, conduct which the statute itself does not prohibit. To date, that controversial proposition has found support only in the context of the Title VI regulations at issue in *Guardians*. Those regulations left no doubt that the relevant agencies specifically intended to proscribe conduct which had a disproportionate impact on members of one race, regardless of the motivations underlying that conduct.[21] And in *Guardians* five members of this Court, in multiple opinions, held that, although Title VI is violated only by intentionally discriminatory actions, actions having "an unjustifiable disparate impact on minorities could be redressed through agency regulations," because *Congress* in Title VI "*delegated to the agencies* . . . the complex determination of what sorts of disparate impacts . . . [are] remediable." *Alexander*, 469 U.S. at 293 (emphasis added).

The court below, purporting to rely upon this Court's opinions in *Guardians*, extended the principle developed there far beyond the narrow *Guardians* context approved by this Court. Specifically, the court held that even in the face of a statutory provision that appears absolutely to preclude disparate impact liability, *see* 20 U.S.C. § 1681(b),[22] a court may impose such liability if the agency so authorizes. In addition, the court eschewed any notion that the

---

[21] *See, e.g.*, 24 CFR § 1.4(b)(vii)(2)(i) (prohibiting housing decisions which "have the *effect* of subjecting persons to discrimination because of their race, color, or national origin, or have the *effect* of defeating or substantially impairing accomplishment of the objectives of the program or activity as respect to persons of a particular race, color, or national origin") (emphasis added).

[22] As noted above, 20 U.S.C. § 1681(b) provides that nothing in Title IX "shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in . . . any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community . . . ."

agency must in the implementing regulations clearly express its intent that liability be available on a statistical imbalance theory. Rather, the court held, agency intent to expand the scope of liability may be *inferred* from, *inter alia*, agency policy interpretations and manuals.

Thus, the Tenth Circuit has ruled that not only regulations, but also policy interpretations and agency manuals, may extend statutory prohibitions. It has done so in the case of a statute whose regulations are *not* inconsistent with the statute and have been misread by the lower courts. In fact, there is significant evidence that OCR did *not* intend its regulations to authorize disparate impact liability. The final version of the regulations deleted proposed language that would have required educational institutions to make affirmative efforts to provide "athletic opportunities in such sports and through such teams as will most effectively equalize such opportunities for members of both sexes." *Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, Proposed Rule, 39 Fed. Reg. 22228, 22236 (1974). OCR explained that since the proposed language "could be considered 'affirmative action' . . . [this section] has been deleted." *Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance*, Final Regulation, 40 Fed. Reg. 24128, 24134 (1975). Similarly, the proposed policy interpretation made it clear that:

> The Title IX regulation does not require an equal number of men and women participants or an equal number of men's and women's sports. Rather, it requires that the interests and abilities of men and women be equally accommodated.

Proposed Policy Interpretation, 43 Fed. Reg. 58070, 58074 (1978). Certainly, there is no *clear* indication that OCR meant through its implementing regulations to proscribe any conduct other than the gender-motivated discrimination prohibited by Congress.

In "interpreting" the implementing regulations, the court of

appeals effectively transformed Title IX from an antidiscrimination statute into a law that imposes affirmative statistical obligations on all educational institutions that choose to sponsor intercollegiate or interscholastic athletics. Even assuming that there is some correlation between relative male/female college enrollment and the respective groups' interest and ability to participate in intercollegiate varsity sports,[23] a serious question exists whether in these circumstances inferring agency "intent" to allow disparate impact liability furthers *congressional* design -- as this Court found it did in *Guardians* -- or foils that design and constitutes impermissible agency or judicial legislation.

Whatever the merit of the Tenth Circuit's approach, however, it surely represents a major extension of the disputed principle espoused by the *Guardians* majority. The importance of this issue -- both to OCR and other agencies that administer federal antidiscrimination statutes and to the countless private and public institutions subject to such regulation -- cannot be overstated. Indeed, this issue alone is worthy of this Court's immediate review.[24]

---

[23] In fact, NCAA statistics show that male "walk-ons" -- *i.e.*, student-athletes who compete without scholarships -- outnumber female counterparts by 3-to-1. NCAA, *Gender Equity Study: Summary of Results* 4 - 5 (1992). *See also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 507 (1989) ("[w]hen special qualifications are required . . ., comparisons to the general population (rather than to the smaller group of individuals who possess the necessary qualifications) may have little probative value"); *Hazelwood School Dist. v. United States*, 433 U.S. 299, 308 n.13 (1977) (rejecting assumption that members of one race will choose particular lines of employment "in lockstep proportion to their representation in the local population" as "completely unrealistic").

[24] Moreover, although this Court has long recognized that under certain antidiscrimination statutes, statistical evidence of disparate impact may establish a *prima facie* case of unlawful discrimination -- rebuttable upon a showing of business or educational necessity, *see, e.g.*, *Connecticut v. Teal*, 457 U.S. 440, 446-47 (1982); *Debra P. v. Turlington*, 644 F.2d 397, 407 (5th Cir. 1981) -- this case apparently represents the first time that a court

C. BY IMPOSING A REMEDIAL SCHEME WHICH DENIES ANY INSTITUTIONAL DISCRETION AND WHICH MANDATES THE PERMANENT ADDITION OF A PARTICULAR SPORT, THE COURT BELOW CONTRADICTED THE RULE OF THE FIRST CIRCUIT.

In addition, the remedial scheme imposed by the courts below is in direct conflict with the rule of the United States Court of Appeals for the First Circuit in *Cohen*. In *Cohen* members of Brown University's women's gymnastics and volleyball teams sought reinstatement of those programs to varsity status (from the "club" status to which the university had assigned them). The district court granted the plaintiffs a preliminary injunction pending trial on the issue of Title IX liability. Although the First Circuit upheld the district court's *temporary* injunction, it observed:

> We are a society that cherishes academic freedom and recognizes that universities deserve great leeway in their operations. . . . The district court has noted, we believe appropriately, that if it ultimately finds Brown's athletic program to violate Title IX, it will initially require the University to propose a compliance plan rather than mandate the creation or deletion of particular athletic teams. . . . [T]he many routes to Title IX compliance make specific relief most useful in situations where the institution, after a judicial determination of non-compliance, demonstrates an unwillingness or inability

---

has sanctioned an approach that creates an *irrebuttable* presumption of unlawful discrimination upon evidence of statistical imbalance. *See Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 997-98 (1988) (recognizing importance of allowing defendant an opportunity to rebut statistical evidence).

> to exercise its discretion in a way that brings it into compliance with Title IX.

Id. at 906-07. Thus, the First Circuit, in square conflict with the Tenth, permits an educational institution found after trial to have violated Title IX to devise its own method of achieving compliance, and, absent a refusal or inability to do so, courts in the First Circuit may not intrude on the institution's discretion how best to allocate its limited resources consistent with the requirements of Title IX.

The *Cohen* court also ruled that "Title IX does not require [educational] institutions to fund any particular number or type of athletic opportunities -- only that they provide those opportunities in a non-discriminatory fashion if they wish to receive federal funds." *Id.* at 906. Thus, in the First Circuit, if an institution loses a Title IX suit brought by gymnasts and volleyball players, it is under no obligation to have a women's gymnastics or volleyball team so long as it achieves Title IX compliance by other means.

In contrast, in the Tenth Circuit, *federal courts* will in the first instance dictate how state and private educational institutions must comply with Title IX. Moreover, in the Tenth Circuit, the federal courts are free to mandate the *permanent* addition of a particular sport desired by the plaintiffs,[25] and thus can impose a method of compliance on a state institution which is far more expensive than

---

[25] Although the respondents will lose standing to seek enforcement of the lower courts' orders upon the exhaustion of their athletic eligibility, *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976), new softball players, who must be recruited in order to comply with the lower court's order, presumably can stop any future effort to discontinue the softball team by asserting that their interests and abilities are not being accommodated.

many of the alternatives.[26] Indeed, under the decision of the lower court, the Board is given less discretion in remedying a purported *unintentional* Title IX violation than school districts which have intentionally denied basic educational benefits on the basis of race. *See, e.g., Missouri v. Jenkins*, 495 U.S. 33, 51 (1990) ("[t]he very complexity of the problems of financing and managing a . . . public school system suggests that 'there will be more than one constitutionally permissible method of solving them'. . . . By no means should a district court grant local government *carte blanche*, . . . but local officials should at least have the opportunity to devise their own solutions to these problems") (citations omitted).[27] As a result, the Board is here precluded from making changes to its athletic programs which will more effectively serve the interests and abilities of its women students and at the same time achieve greater proportionality. Educational institutions across the

---

[26] In addition to being unduly intrusive, this remedial approach does not even correct the purported violation of Title IX. Even after reinstating women's softball, CSU will not meet the court's definition of "substantial proportionality," will not have "a history and continuing practice of program expansion," and cannot state that each and every interest of female student-athletes is being "effectively accommodated." Therefore, the remedy ordered by the lower court merely grants the respondents what they wanted and invites further Title IX litigation against CSU.

[27] OCR has long recognized that its regulations grant higher education institutions discretion to comply with the equal opportunity requirement in a way they find most appropriate in light of all relevant considerations. The *Policy Interpretation*, for example, states that OCR investigators must

> resolve violations by obtaining a voluntary compliance agreement from the recipient. This is done through negotiations between [OCR] and the recipient, the goal of which is agreement on steps the recipient will take to achieve compliance . . .. When agreement is reached, [OCR] notifies the institution that its plan is acceptable.

Policy Interpretation, 44 Fed. Reg. at 71418.

country have a pressing need to know which of these two remedial approaches is consistent with Title IX.

II. THE HOLDING OF THE COURT BELOW HAS PROFOUND IMPLICATIONS FOR EVERY EDUCATIONAL INSTITUTION WHICH SPONSORS INTERCOLLEGIATE OR INTERSCHOLASTIC SPORTS.

This case also warrants review because of the far-reaching practical implications of the decision below on educational institutions across the country. Much more is at stake than the future of a single intercollegiate softball team. Presently over 1,250 colleges and universities field intercollegiate athletic programs,[28] and some

---

[28] This number is derived adding the NCAA membership to the membership of the National Association for Intercollegiate Athletics. Of this number, 58% are field intercollegiate football programs. This is significant because, according to NCAA statistics, the average college football team has a roster of in excess of 100 student athletes and there is no female sport that can counterbalance these numbers. Thus, the mere fielding of a football team renders compliance with the Tenth Circuit's substantial proportionality requirement virtually impossible. *Compare* Komer, *Deputy Assistant Secretary's Memorandum of April 15, 1991, Concerning Technical Assistance Documents for Title IX Intercollegiate Athletics National Enforcement Strategy* at 9 ("Offering football can result in a lot of imbalances in an athletics program. Those imbalances can be acceptable under Title IX as long as, overall, benefits and services provided to women's teams are equivalent to those provided to men's teams").

Illustrative of the significance of football to any statistical analysis is the case at CSU. During the 1992-93 school year the district court found that women had 120 intercollegiate athletic participation opportunities and men had 198. If CSU's 105 person football squad is deducted from the male number of 198, female student-athletes outnumber their male counterparts by 50. Unless football -- or all other male sports programs -- are dropped, achieving numerical parity is difficult. There is certainly no evidence that Congress intended this result.

400,000 persons compete regularly on intercollegiate athletic teams. Moreover, although the Title IX issues raised here arise in the university setting, most, if not all, high schools also receive federal funds. Thus, they are subject to the requirements of Title IX. *See, e.g.*, 34 CFR § 106.41(d).[29] Because most schools have male and female enrollments that are approximately equal, the Tenth Circuit's unrealistic substantial proportionality test places virtually all of these educational institutions in violation of federal law.

Moreover, under the holding below, all colleges and universities that sponsor intercollegiate sports will *eventually* have to have precise alignment between participation rates and enrollment rates, *regardless* of whether the members of both genders actually wish and are able to participate at the levels reflected by their enrollment. If a school does not reach substantial parity, it invites federal courts to add to its budgetary problems by adding as many teams as federal judges think are necessary to accommodate the interests and abilities of the under-represented gender.

The practical implications of the court's decision stand Title IX on its head in at least three ways. First, the court's decision creates distorted incentives for college and university decision-makers that ultimately will thwart the very goal of Title IX -- namely, to achieve gender equity. The Tenth Circuit has made it plain that continued expansion is one way to achieve compliance with Title IX. Yet, under the court's holding, once a team for an under-represented gender is added, it can *never* be eliminated as long as that group remains under-represented, because the mere existence of the displaced athletes establishes "unaccommodated interests and abilities." Indeed, under the lower court's holding, once a team is established, the university has an affirmative obligation to maintain

---

[29] Local school districts receive federal funds under a variety of statutes including 20 U.S.C. § 1401 *et seq.*; 20 U.S.C. § 2701 *et seq.*; 20 U.S.C. § 2911 *et seq.*; 20 U.S.C. § 2982 *et seq.*; 20 U.S.C. § 3171 *et seq.*

that sport by *recruiting* students with the requisite interests and abilities. The permanency of this "one-way ratchet" with which the court's decision imbues teams of the under-represented gender is clearly an enormous disincentive ever to add new teams for the under-represented gender, a result utterly inconsistent with the intent of Title IX.[30]

Second, the decision below actually penalizes those schools which, like CSU, attempted to comply with Title IX the fastest by making them most vulnerable to legal challenges. Thus, because CSU moved dramatically in the 1970s to remedy inequality by creating numerous new sports opportunities for women -- ultimately resulting in a *greater* number of women's teams at CSU than men's teams -- it is now "locked in" to those offerings, and cannot respond to current budgetary constraints by making fiscally sensible, even-handed cuts in athletics for *both* men and women.

Educational institutions, including high schools, face unprecedented financial difficulties from which athletic departments have not been immune. The NCAA, the governing body for much of college athletics, has passed a variety of cost-containment measures, and individual institutions have also moved to address the issue, frequently by making reductions in program offerings. But under the court's analysis, even if an institution is prepared to make dramatically greater reductions in men's team participation numbers, it may *never* reduce or eliminate offerings to women; the ability of the Board and other schools like it to make decisions that best

---

[30] The decision below also discourages other means of increasing female intercollegiate athletic opportunities. One such method is the provision of more athletic scholarships in women's sports, which was an intended use by the Board of the very funds saved by cutting the men's baseball and the women's softball team. Others include upgrading facilities and improving coaching and training. Faced with the prospect of indeterminable cost increases from court-ordered team additions, however, institutions are likely to cut back on expenditures in these other important areas.

accommodate students' needs and fiscal constraints has effectively been eliminated.

Third, if a university finds itself in the increasingly common circumstance of lacking funds to expand its athletic programs, and is thus unable to satisfy the "continuing practice of expansion" prong of what the Tenth Circuit has determined is the "test" for compliance with Title IX, it can fulfill that test only by eliminating men's teams. As this case demonstrates, if an educational institution chooses to eliminate one sport currently offered to each gender, then the team members of the under-represented gender may through Title IX force the reinstatement of their team on the ground that their interests and abilities are not being fully accommodated. In contrast, the team members of the over-represented gender are entitled to nothing even though their injury, loss of the team, is every bit as great as the injury to the team members of the under-represented sex. In effect, the mere gender of the participants makes certain programs sacrosanct. Educational institutions under financial strain are thus *prohibited* by Title IX from making gender-neutral decisions. Ironically, the decision below requires such schools intentionally to discriminate against men solely on the basis of sex in order to satisfy Title IX's command that "[n]o person . . . shall, on the basis of sex, . . . be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a).

The absurd results mandated by the Tenth Circuit approach are amply illustrated in a recent Illinois district court opinion, which expressly relied on the decision below. *See Kelley v. Board of Trustees of the Univ. of Illinois*, ___ F. Supp. ___, 1993 WL 334771 (C.D. Ill. Sept. 1, 1993). In that case the university, in response to budget constraints, cut only male athletic opportunities. The court found that the motivation for this approach was compliance with Title IX and a "gender equity" policy of the Big Ten conference. The displaced male athletes challenged the university's decision as intentional discrimination in violation of Title IX. The court accepted

the plaintiffs' characterization of the university's action as intentional gender-based discrimination, but nonetheless granted the *university's* motion for summary judgment. *See id.* at ___, 1993 WL 334771 at 6. ("The Court is not unsympathetic to the plight of members on the men's swimming team and recognizes that Congress, in enacting Title IX, probably never anticipated that it would yield such draconian results"). Thus, conduct clearly prohibited by Title IX is encouraged -- indeed, mandated -- while conduct not reached by the statute and, at best, only hinted at in the regulations, is severely penalized.[31]

The clear effect of the Tenth Circuit's holding is to place an affirmative duty on educational institutions to prefer members of the "under-represented gender," either by continually adding new teams for the under-represented gender or by providing intercollegiate or interscholastic athletic opportunities for *100%* of the willing and able members of that gender (regardless of what portion of willing and able members of the over-represented gender receive such opportunities). As a result, the lower court's holding will lead to a revolutionary restructuring of intercollegiate and interscholastic athletic departments. Before such wholesale, and potentially irreversible, changes are allowed to take place, this Court should

---

[31] In light of the earlier decisions of the First and Tenth Circuits, it is difficult to criticize the *Kelley* court's decision to read the prohibition on intentional discrimination out of Title IX. The court's only alternative was to place educational institutions in a Catch-22: If an institution downsized its athletic programs in a manner that reduced athletic opportunities for both male and female student-athletes, it would violate the Tenth Circuit's "statistical imbalance" theory of Title IX liability, even if, as here, male student-athletes bore a disproportionate share of the burden. If, however, the institution attempted to avoid such liability by intentionally singling out men's programs for budget cuts, it would violate the statute-based intentional discrimination theory of liability. It is difficult to imagine that Congress intended to place the nation's educational institutions -- and ultimately, the very student-athletes Title IX was designed to benefit -- in such a helpless situation.

determine whether the lower court decisions that mandate those changes are consistent with the language and purposes of Title IX. This case presents a perfect vehicle for resolving those important issues.

CONCLUSION

For the reasons stated herein, this Court should issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted this 4th day of October 1993.

GALE A. NORTON*
Attorney General of Colorado
TIMOTHY M. TYMKOVICH
Solicitor General
PAUL FARLEY
Deputy Attorney General
ANTONY B. DYL
First Assistant Attorney General
WILLIAM E. THRO
Assistant Attorney General
Colorado Department of Law
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
Telephone: (303) 866-5680

REX E. LEE
Special Assistant Attorney General
2840 Iroquois Drive
Provo, Utah 84604
Telephone: (801) 373-3342

ATTORNEYS FOR THE PETITIONER

**Counsel of Record*

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 93-Z-1310

JENNIFER ROBERTS, JULIE OSBORNE, JANET BRUMBELOW, LAURA BIELAK, SARA STOUT, AMY RECOUPER, JENNIFER JACOBS, MALIA KUENZLI, STACIE STAFFORD, HEATHER NAKASONE, KIM JOHNSON, AIMEE RICE, AND LISA MIZE,

Plaintiffs,

vs.

COLORADO STATE UNIVERSITY, COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the entity charged with the general control and supervision of Colorado State University,

Defendants.

OPINION AND ORDER

Weinshienk, District Judge

Procedural and Factual Background

Plaintiffs are former members of the Colorado State University (CSU) women's varsity softball team which was terminated on June

1, 1992. Plaintiffs seek reinstatement of the softball team and damages. A hearing on plaintiffs' Complaint For Injunctive Relief was held on July 17, 1992. At that time, the Court denied plaintiffs' Motion For Injunctive Relief due to plaintiffs' inability to demonstrate a substantial likelihood of success on the merits. *Lundgrin v. Claytor*, 619 F.2d 61 (10th Cir. 1980). At the conclusion of this hearing, the parties stipulated to a stay of the sale of the softball team's equipment, plaintiffs' continued receipt of their softball scholarships without work requirements for the 1992-1993 school year, and expedited discovery. A status conference was held on October 26, 1992, at which the parties agreed to bifurcate the violation and damages phases of the trial. The case is set for a two day trial to Court on the issue of damages on Thursday, March 25, 1993.

A trial to court concerning plaintiffs' request for a permanent injunction reinstating the women's intercollegiate softball program at CSU was held on November 19, 1992, continuing on November 20, 23, and 24, 1992. After careful consideration, the Court has made findings of fact and conclusions of law based upon the evidence presented during the trial and the pre-trial briefs submitted by the parties.

Regulatory Framework of Title IX

The central question in this case is whether defendants' termination of the women's softball team either caused a violation of Title IX or was the perpetuation of an already existing violation by defendants. This and other issues presented in the instant case necessitate a brief analysis of the regulatory framework of Title IX. Title IX, which is codified at 20 U.S.C. § 1681, became effective on July 1, 1972, and provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."

Defendants concede that Colorado State University is an educational institution receiving federal financial assistance, and the Court determines that CSU's athletic department is subject to the provisions of Title IX.

The regulations interpreting the application of Title IX to athletic programs became effective on July 21, 1975. These regulations require that "a recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes." 34 CFR § 106.41(c). In determining whether equal opportunities are available, the Director of the Office of Civil Rights of the Department of Education (OCR) must consider, among other factors, "whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes." 34 CFR § 106.41(c)(1).

A Policy Interpretation further developing the meaning of "equal opportunity" in intercollegiate athletics was issued in 1979. *See* Policy Interpretation, 44 Fed. Reg. 71413 (Dec. 11, 1979). The express purpose of the Title IX Policy Interpretation is to explain the factors and standards which the Department of Education will consider in determining whether an institution's intercollegiate athletics program complies with the law and governing regulations. 44 Fed. Reg. 71413. The policy interpretation is divided into three areas of inquiry: Athletic Financial Assistance (Scholarships), 34 CFR § 106.37(c); Equivalence in Other Athletic Benefits and Opportunities, 34 CFR § 106.41(c)(2)-(10); and Effective Accommodation of Student Interests And Abilities, 34 CFR § 106.41(c)(1). 44 Fed. Reg. at 71414.

In April of 1990, the OCR of the Department of Education issued the *Title IX Athletics Investigator's Manual* to assist OCR personnel in conducting athletic investigations. Defendants' Exhibit A. According to the Investigator's Manual, "the intercollegiate athletics Policy Interpretation requires that OCR use an overall

approach and review the total athletics program for intercollegiate athletics investigations." *Id.* at 7. However, the Investigator's Manual also reiterates the three major areas of investigation established in the Policy Interpretation and states that "an investigation may be limited to less than all three off these major areas where unique circumstances justify limiting a particular investigation to one or two of these major areas." *Id.*

Plaintiffs' allegations of discrimination under Title IX are narrowly stated under the third prong of the Policy Interpretation: Effective Accommodation of Student Interests And Abilities, 34 CFR § 106.41(c)(1). Although defendants argue that the language in the Investigator's Manual requires that plaintiffs demonstrate an overall violation of either 34 CFR § 106.37(c) or 34 CFR § 106.41(c)(1)-(10) in order to sustain a claim of discrimination under Title IX, the Court is satisfied that the regulations and Policy Interpretation allow for a showing of violation under 34 CFR § 106.41(c)(1) only. The decisions in *Favia v. Indiana University Of Pennsylvania*, No. 92-2045, slip op. (W.D. Pa. November 2, 1992), and *Cohen v. Brown University*, No. 92-197, slip op. (D.R.I. December 22, 1992), support this view. In *Favia*, female students sought reinstatement of two women's teams eliminated by the defendant university's budget reduction efforts. Although the *Favia* Court mentioned disparities in athletic scholarships in the opinion, the Court's ruling in favor of plaintiffs was based largely upon an analysis made under 34 CFR § 106.41(c)(1). *Favia*, slip op. at 15. Plaintiffs in the *Cohen* case challenged Brown University's demotion of two women's teams from varsity to club status. In granting plaintiffs' motion for a preliminary injunction, the *Cohen* Court specifically held that a finding of a Title IX violation may be limited solely to 34 CFR § 106.41(c)(1). *Cohen*, slip op. at 27.

Although minor inconsistencies do exist between the Policy Interpretation and the Investigator's Manual, an evaluation of CSU's entire athletic program is neither required nor necessary to the resolution of the issues presented in this case. After examining both

the regulatory framework of Title IX and the language in the *Favia* and *Cohen* cases, the Court is convinced that a violation of Title IX may be shown by proof of a substantial violation in any one of the three major areas of investigation set out in the Policy Interpretation. Thus, the Court's findings of fact and conclusions of law will be limited to 34 CFR § 106.41(c)(1), the prong regarding the effective accommodation of student interests and abilities.

The Policy Interpretation delineates three areas of inquiry which should be considered in assessing compliance with 34 CFR § 106.41(c)(1):

> 1. Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> 2. Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interests and abilities of the members of that sex; or
>
> 3. Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by the present program.

44 Fed. Reg. at 71418. The Court will hereafter refer to these three prongs as the "Effective Accommodation" test. Plaintiffs have the burden of proving that intercollegiate level participation opportunities for male and female students are not provided in numbers substantially proportionate to their respective enrollments. *Favia*, slip

op. at 15. Defendants have the burden of proof as to the second and third prongs of the Effective Accommodation test. *Id.*; *See also, Cohen*, slip op. at 34.

Findings of Fact and Conclusions of Law

1. Substantial Proportionality

At trial, defendants argued that the Court should not rely on the statistics submitted by plaintiffs for the 1980-81 and 1981-82 school years in determining whether CSU is in compliance with 34 CFR § 106.41(c)(1). *See* Plaintiffs' Exhibit 64. All of the figures contained in Exhibit 64 were obtained from Ms. Roselyn Cutler, CSU's Title IX Coordinator, either during or after her deposition. Ms. Cutler testified at trial that the figures for the 1980-81 and 1981-82 school years were taken from the squad lists for that year. Although defendants stressed Ms. Cutler's testimony on redirect that she was unable to confirm the validity of the figures for the years in question, they failed to explain why the same allegedly unreliable figures were provided to the OCR in 1983 during the OCR's Title IX compliance review of CSU. Defendants also have failed to offer any figures which they believe to be more accurate than those before the Court. Finally, defendants did not articulate any cognizable difference between the manner in which the figures for the two years in question were compiled and that in which the figures for the other years were gathered. For these reasons, the Court rejects defendants' argument and will therefore consider as accurate the figures for the 1980-81 and 1981-82 school years indicated in Exhibit 64.

Beginning with the 1980-82 academic school year and ending with the current school year, the gaps between women's athletic participation rates and their undergraduate enrollment at CSU have been, respectively, 7.5%, 12.6%, 15.6%, 15%, 18.6%, 12.3%, 16.5%, 14.8%, 15.6%, 16.7%, 14.9%, 12.7%, and 10.6%. *See* Exhibit 64. During this twelve year period, the average disparity

between enrollment and athletic participation rates for women was 14.1%.

During the 1991-92 academic school year CSU funded a total of 17 varsity teams for male and female students. Defendants' Exhibit R. In 1991-92, women comprised 35.2% of the total athletes at CSU. At the same time, the enrollment of women at CSU was 47.9% of the total student population. Exhibit 64. Thus, the disparity between the percentage of women enrolled at CSU and the percentage of women participating in athletics at CSU prior to the June 1, 1992, termination of the women's softball team was 12.7%. In the current 1992-93 school year, women athletes now make up approximately 37.7% of total athletes participating in CSU's intercollegiate programs. The enrollment of women at CSU is currently 48.2% of the undergraduate student population. Therefore, the enrollment versus participation disparity rate for females at CSU after the termination of the women's softball team is 10.5%. *Id.*

CSU argues that its current female participation rate is substantially proportionate to the current female enrollment rate. Defendants' Pre-Trial Brief, p. 11. According to defendants, the regulatory framework of Title IX provides no guidance in determining substantial proportionality. In addition, defendants argue that the OCR has specifically rejected the setting of a particular figure against which compliance with 34 CFR § 106.41(c)(1) can be judged. *Id.* at 12. The language contained in the Investigator's Manual to which defendants are apparently referring reads that "there is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation. All factors for this program component, and any justifications for differences offered by the institution, must be considered before a finding is made." Defendants' Exhibit A at 24. However, this section of the Investigator's Manual must be read in conjunction with other relevant language contained in the manual, with the October 14, 1983, Statement of Findings issued by the OCR after it completed a Title IX compliance review of CSU's athletic department, and with the *Cohen*

case.

In the paragraph immediately preceding the language upon which defendants' apparently rely, the Investigator's Manual directs OCR personnel investigating the substantial proportionality prong under 34 CFR § 106.41(c)(1) to first compare the number of male and female participants with the number of full-time undergraduate students. Exhibit A at 24. The manual then advises OCR investigators that "if the results are substantially proportionate (for example, if the enrollment is 52% male and 48% female, then, ideally, about 52% of the participants in the athletics program should be male and 48% female), the recipient is effectively accommodating the interests and abilities of both sexes." *Id.* The Court finds this language to be useful in determining the intended meaning of the term "substantially proportionate". The following language contained in the Investigator's Manual also is considered by the Court:

> OCR investigative experience indicates that where budget restrictions have led a recipient to eliminate sports previously offered, there is frequently a compliance problem with this program component. The tendency is for institutions to eliminate a sport previously offered to women who are already under-represented in the institution's athletics programs. The result has been that women are now more disadvantaged by the elimination of a women's team despite sufficient interest and ability to sustain a viable team. In this situation, the institution may well be in violation of this program component.

Id. at 27.

The Statement of Findings issued by the OCR after completing a Title IX compliance review at CSU in 1983 provides the Court with further guidance as to what numerical disparity between female participation rates and enrollment should be considered to be "substantial." In its Statement of Findings, the OCR refers to a table

listing sports and the number of participants for three academic years, 1980-81 through 1982-83. Plaintiffs' Exhibit 2 at 77. Noting a difference between the percent of women enrolled and women's athletic participation of 7.5%, 12.5%, and 12.7%, respectively, for the three academic years being reviewed, the OCR concluded that "the intercollegiate level participation opportunities for male and female students are not substantially proportionate to their respective enrollments." *Id.* The OCR also noted that women's field hockey was to be dropped following the 1983-84 academic year, stating that "as a consequence of this action, the disparity between women's participation opportunities not being substantially proportionate to their enrollment will be exacerbated." *Id.*

Finally, the recent decision in the *Cohen* case offers the Court additional guidance on the meaning of the term substantially proportionate. In *Cohen*, the disparity between the defendant university's female athletes and their respective enrollments after the demotion of four varsity teams was found to be 11.6%. *Cohen* at 31. Based on this disparity, the *Cohen* Court held that plaintiffs had successfully demonstrated that the ratio of female varsity athletes to their respective enrollments was not "substantially proportionate." *Id.*

After reviewing the statistical evidence submitted at trial and the sources of guidance cited in the preceding paragraphs, the Court determines that the current rate of female participation in athletics at CSU is not substantially proportionate to female undergraduate enrollment. More specifically, the Court finds that a disparity between female athletic participation and female undergraduate enrollment of 10.6% is not acceptable under Title IX absent a showing by defendants under the second or third prong of the Effective Accommodation test.

In addition, the Court finds that for at least the last decade, female participation rates at CSU have not been substantially proportionate to CSU's female undergraduate enrollment. The affidavit of Dr. Mary Gray, a professor of mathematics and statistics

at American University, was introduced at trial. Plaintiffs' Exhibit 54. In this affidavit, Dr. Gray testified credibly and persuasively that the difference between the proportion of women as undergraduates and their participation rate in athletics at CSU is highly statistically significant, and represents a persistent pattern over the last ten years. The Court agrees with Dr. Gray's conclusion that the disparities between women's enrollment and athletic participation rates at CSU over the last decade could not have occurred merely by chance.

On a final note, defendants argued strenuously in their brief and at trial that a finding by this Court that CSU's female enrollment versus participation statistics are not substantially proportionate will necessarily implicate the athletic departments of virtually every institution of higher education in this country. Plaintiffs, however, have alleged a violation of Title IX solely against CSU. In addition, if defendants are found by this Court to be in violation of Title IX, the fact that CSU's participation statistics are better than those of other schools is of no legal consequence. Accordingly, this Court has not considered how CSU's participation rates compare with those of other undergraduate institutions. The issue of whether other universities are complying with Title IX is for other courts to decide based upon individualized allegations and independent findings of fact.

2. History of Program Expansion

It has been demonstrated that female enrollment is not substantially proportionate to female athletic participation at CSU. Therefore, the Court must now consider the second prong of the Effective Accommodation test. This prong is particularly difficult to determine given the fact that the absolute number of opportunities to compete in intercollegiate athletics at CSU has decreased for both women and men in the last decade. Unfortunately, CSU has been no exception to the economic reality of more restrictive budgets which most of our nation's educational institutions are facing. However, because women were in the past and continue to be under-represented

in CSU athletics, CSU must demonstrate to the Court's satisfaction a history and continuing practice of program expansion for women.

While admitting that prior to 1970, CSU did not offer a single sport for women, defendants point to the addition of eleven sports for women during the 1970's as evidence of athletic program expansion for women at CSU. Defendants' Pre-Trial Brief at 14. Although the Court agrees that the eight women's teams currently offered by CSU are an improvement over the non-existent state of women's teams prior to 1970, the Court cannot accept defendants' conclusion that the mere fact that CSU now offers women's teams is evidence of program expansion for women. This Court's acceptance of such an argument would render meaningless Title IX's regulations and its Policy Interpretation. Acceptance of this argument also would implicitly condone the attitude that female athletes at CSU should be satisfied with their current opportunities given the pre-1970 lack of participation opportunities for women in intercollegiate athletics. The regulations which implemented Title IX were promulgated for the very purpose of rectifying historical inequities between men's and women's intercollegiate athletic programs. Indeed, the program expansion prong of the Effective Accommodation test was not intended to stop the compliance inquiry as to any institution that can demonstrate that it has added a women's sports team sometime in the last three decades. In this regard, the Court rejects as insufficient defendants' assertion that they have demonstrated program expansion because women's team were added at CSU during the 1970's.

CSU further contends that its decision to cut baseball and softball must be regarded as a positive proportional development for women under Title IX because the termination of women's softball, with its 18 participants, and men's baseball, with its 55 participants, actually caused the women's participation rate at CSU to rise. Defendants' Pre-Trial Brief at 6. While it is true that the disparity between women's enrollment and athletic participation is less now than it was prior to the termination of softball, defendants' assertion fails to take into consideration the facts that the actual number of

athletic participation opportunities for women at CSU have steadily declined over the past twelve years and that no new varsity teams for women have been added during that time. The Court determines that CSU cannot show program expansion for women solely by pointing to increases in the percentage of women athletes caused by reducing the number of men athletes. CSU must either demonstrate actual expansion in women's athletic programming or establish that it has considered and improved upon the under-represented status of women athletes when reductions in athletic programs became necessary in the past.

After considering the dynamics of program contraction at CSU over the last twelve years, the Court is convinced that CSU did not seriously consider nor improve the representation of female athletes when budget cuts became necessary. For example, four women's varsity teams have been dropped since the 1980-81 school year; gymnastics in 1980, field hockey in 1984, junior varsity volleyball in 1987, and softball in 1992. During the same time period, and despite the under-representation of women athletes, the men lost only three varsity teams; gymnastics in 1980, wrestling in 1986, and baseball in 1992.

Since 1980-81, the total number of participation opportunities for women athletes have decreased from 183 opportunities to 120 in 1992-93. During the 1980-81 school year, male athletes at CSU maintained 246 participation opportunities. This number has decreased to 198 male participation opportunities in 1992-93. *See* Exhibit 64. Thus, it is undeniable that in the last twelve years women's participation opportunities have declined by approximately 34 percent or 63 participation opportunities while men's participation opportunities have declined by approximately 20 percent or 48 participation opportunities. The Court finds that in the last twelve years, women have been disproportionately impacted by the general reduction in athletic participation opportunities at CSU. In accordance with this finding, the Court concludes that CSU has failed to demonstrate program expansion in the area of providing athletic

participation opportunities for women.

The Court determines that the relevant period of inquiry as to CSU's other program expansion efforts is the era in which CSU was put on notice that female athletes' participation rates were not substantially proportionate to female undergraduate enrollment. In 1983, the OCR for the Department of Education conducted a Title IX Compliance review of CSU's athletic department. In the cover letter attached to the OCR's Statement of Findings, the former Regional Director of the OCR, Dr. Gilbert D. Roman, indicated that "benefits, opportunities, and treatment are not equivalent in the areas of equipment and supplies, locker rooms, coaching, recruitment, publicity, support services and the effective accommodation of student interests and abilities. OCR concluded that collectively these disparities violate Title IX." Plaintiffs' Exhibit 2 at 3 - 4. Dr. Roman went on to state, however, that "based upon your written assurance that the remedial actions set forth in your submitted plan are being implemented, we consider Colorado State University to be presently fulfilling its obligations under 34 CFR § 106.41(c) ... continued compliance is contingent upon carrying out the provisions of the plan." *Id.*

The corrective action plan to which Dr. Roman referred in his letter was submitted to the OCR in September of 1983. *See* Plaintiffs' Exhibit 6. In this plan, CSU committed to raising the participation rate of women to 46.5% by the 1987-88 school year. CSU also agreed to develop junior varsity teams for the women's volleyball and basketball teams. In addition, CSU pledged itself to small increases in participation on several of the women's teams. The evidence received at trial demonstrated that CSU did not meet its 1987-88 participation goal of 46.5 percent. In fact, the evidence shows that the athletic participation rate of females at CSU during the 1987-88 school year was 33.8 percent. *See* Exhibit 64. The evidence also indicates that CSU added a women's junior varsity volleyball team in 1984, but dropped the team in 1987.

In May of 1985, defendants submitted to the OCR a progress report concerning the implementation of their 1983 Title IX corrective action plan. *See* Plaintiffs' Exhibit 15. In this progress report, defendants' represented to the OCR that "the Corrective action plan states 'In 1987-88, 46.5% of the participants will be women and 53.3% will be men.' In pursuit of that goal, and precisely as planned for 1984-85, the 1984-85 participation rates were 42.9% for women and 57.1% for men." *Id.* at 3. However, Ms. Cutler testified at trial that the female participation percentage stated in the letter was incorrect. From the figures produced by Ms. Cutler at her deposition, it appears that the actual female participation rate for women during the 1984-85 school year was 30.7%. *See* Exhibit 64. In their progress report, defendants also reported to the OCR that due to the elimination of men's varsity wrestling, it was no longer necessary to add a women's junior varsity basketball team in order to achieve the participation figures outlined in the 1983 corrective action plan. Exhibit 15 at 4.

On February 10, 1989, defendants submitted another status report to the OCR regarding CSU's 1983 corrective action plan. Plaintiffs' Exhibit 14. In this status report, defendants admitted that they had not achieved the participation goal for women delineated in their 1983 corrective action plan and attempted to explain their failure. *Id.* at 6. The two reasons cited by defendants as leading them to believe that the participation goal of 46.5% for women was unattainable were that other institutions with which CSU participated regularly had lower participation rates and that statistics generated by the Colorado Department of Education indicated that females made up only 40% of all Colorado high school athletes. *Id.* Defendants also stated that they would put forth their best efforts to maintain or diminish the ratio between CSU's female participation rate and that of Colorado's female high school athletes. Finally, defendants indicated that subsequent to the termination of men's baseball in 1989-90, they planned to modify the on campus baseball field for use as a women's softball facility. *Id.* at 4.

In a letter dated March 8, 1989, Dr. Roman responded to defendants' February 10, 1989, progress report. Defendants' Exhibit BL. In this letter, Dr. Roman determined that CSU had provided "valid, nondiscriminatory reasons" for not meeting the participation goals articulated in defendants' 1983 corrective action plan. *Id* at 2. Dr. Roman also indicated that the monitoring procedures of CSU's athletic department were terminated given CSU's "good faith efforts to increase athletic opportunities for female student athletes." *Id*. With all due respect to Dr. Roman's conclusions, this Court determines that the excuse offered by CSU that other institutions had worse participation rates for female athletes than did CSU is not a valid nondiscriminatory reason for maintaining female participation rates which are substantially disproportionate to female undergraduate enrollment. With regard to defendants' justification that Colorado high school female athletes participate at a rate of 40%, the Court notes that defendants have not matched this lesser and presumably attainable goal of 40% female participation since the 1980-81 school year. *See* Exhibit 14 at 6; *see also*, Exhibit 64. Moreover, the Court finds that CSU's participation figure for females at the time the OCR terminated its monitoring procedures in 1989 were actually lower than they were before the OCR's Title IX compliance review began in 1983. *See* Exhibit 64. The Court concludes that lower participation rates and decreasing participation opportunities for women are not indicators of a good faith effort on behalf of defendants to increase athletic opportunities for female student athletes at Colorado State University.

On November 20, 1991, the CSU athletic department issued a Strategic Plan for Fiscal Years 1992-93 - 1996-97 which identified five programs of emphasis. Plaintiffs' Exhibit 18. The five programs designated for emphasis include football, men's basketball, academic support services, athletic development, and marketing/promotion activities. *Id*. at 6. Although three of the programs to be emphasized presumably will impact female athletes, the only specific mention of future plans to benefit women athletes comes at the end of defendants' enumeration of the five programs of

emphasis. Defendants state that "it's imperative that over the planning period, the Department upgrade the non-revenue sports scholarship base. Volleyball, women's basketball, and swimming will be funded and the balance of women's sports will be funded based on residency dollars." *Id.* at 8. Based upon the above evidence, it appears that defendants do not have any concrete plans to substantially expand its current programs for female athletes in the near future. Indeed, defendants stated in pre-trial interrogatories that CSU does not presently plan to add teams to its intercollegiate athletics program. Plaintiffs' Exhibit 21 at 10.

In summation, the Court notes that none of the major goals articulated in defendants' 1983 corrective action were ever attained. The Court also finds that over the last twelve years women have shouldered a disproportionate amount of the program contraction efforts at CSU. After a careful review of the statistics for the past twelve years and defendants' unattained program expansion goals for CSU, the Court concludes that CSU has not demonstrated a history and continuing practice of program expansion for women.

3. Full and effective Accommodation Of Interests and Abilities

While it has already been determined that women are under-represented among CSU's intercollegiate athletes, and that defendants cannot show a continuing practice of program expansion, defendants can still prevail in this lawsuit if they can demonstrate that the interests and abilities of women are being fully and effectively accommodated by CSU's present athletic program.

At trial, Jennifer Roberts and Aimee Rice Ainsworth testified persuasively about their dedication to the sport of softball, the amount of time they had invested throughout their lives in training for this sport, and tangible losses they are experiencing in not being able to play softball during the current academic year. This testimony was consistent with the testimony of Laura Bielak and Malia Kuenzli at the preliminary injunction hearing and with the affidavits submitted

by the remaining plaintiffs. The testimony of Ms. Roberts and Ms. Rice Ainsworth indicated that CSU's women's softball team finished third in the Western Athletic Conference in 1992. In addition, plaintiff Stacie Stafford was named a Western Athletic Conference Softball Player of the Week in 1992. Ms Roberts and Ms. Rice Ainsworth further testified that CSU freshwomen definitely are interested in fast-pitch softball, and have turned out in considerable numbers to participate in a softball club team. From the testimony presented at trial and the other evidence considered by this Court, it appears that CSU has eliminated varsity athletic opportunities for women in a sport where there is significant interest and talent.

It also appears to the Court that the popularity of women's softball at CSU is a reflection of the sport's growing popularity nationwide. According to Charles W. Rice, the Colorado Commissioner for the Colorado Amateur Softball Association, fast pitch softball is becoming an increasingly popular sport for girls in Colorado. *See* Plaintiffs' Exhibit 52. Figures provided by Mr. Rice indicate that high school competition in fast-pitch softball has increased from approximately 1,950 girls in 1980 to approximately 4,605 girls in 1992, an increase in participation of approximately 236 percent. *Id.* This increase in participation in Colorado is significant because Colorado high schools provide CSU with approximately 75% of its undergraduate student population. Defendants' Pre-Trial Brief at 17. In his affidavit, Mr. Rice also reports that 100% of female high school seniors participating in the Colorado All-Star Girls Fast-Pitch Softball League in the last four years have gone on to college. Finally, Mr. Rice points out that women's fast-pitch softball will be a medal sport in the 1996 Summer Olympics.

The evidence provided by Mr. Rice, Ms. Roberts, Ms. Rice Ainsworth, and the other plaintiffs convinces the Court that a substantial number of current and future CSU female students are now or will be interested in the future in competing on women's varsity, club, and intramural softball teams. Accordingly, the Court finds that there is a strong present and future interest in retaining

women's fast-pitch softball as a varsity sport at CSU. Considering the existing disparity between female and male varsity athletes and their respective enrollments, and the demonstrable interest in the variety opportunities being eliminated, the Court concludes that the termination of these opportunities evidences a failure to accommodate the interests and abilities of women. However, the Court's inquiry as to whether the interests and abilities of women have been fully and effectively accommodated by CSU's athletic program goes beyond the demonstrated interest in women's softball. Are there other women students at CSU whose interests in additional athletic participation opportunities have not been fully and effectively accommodated?

In determining whether CSU is fully and effectively accommodating the interests and abilities of its athletes, the Court may consider the expressed interests of female students, whether there are sufficient numbers of athletes to form a team, and whether there is a reasonable expectation of intercollegiate competition for that team. *Cohen*, slip op. at 34. The testimony of Mr. William Hall, CSU's Club Sports Coordinator, was illuminating with regard to these factors. Mr. Hall testified that he considered the women's soccer, women's lacrosse, women's rugby, women's volleyball, and women's alpine ski club teams to be competitive. According to Mr. Hall, the women's soccer team has expressed its interest in becoming a varsity sport. He added that the women's soccer club has played a competitive intercollegiate game schedule in past seasons. Defendants agree that women's soccer has a popularity level equal to or exceeding the women's fast-pitch softball club. Defendants' Pre-Trial Brief at 20. Further, defendants imply in their brief that were resources not limited, there would be adequate numbers of interested women students at CSU to enable defendants to add varsity teams in women's lacrosse, women's soccer, women's junior varsity volleyball, and women's alpine skiing. *Id.* Further, Mr. Hall's testimony made clear the difference in benefits afforded to club sport participants and to varsity athletes. For example, Mr. Hall testified that CSU sponsors approximately 32 club sports teams with a total budget of approximately $70,000 dollars. This sum is less than half

the amount allocated to the women's varsity softball team for the 1991-92 school year. *See* Plaintiffs' Exhibit 20. In addition, and unlike varsity athletes, club sports participants must pay dues, buy their own equipment, pay their own travel costs, and are not eligible for athletic scholarships.

The Court determines from the testimony of Mr. Hall and the defendants' own arguments that there are women athletes at CSU who are interested in and capable of playing on varsity teams other than those currently offered by CSU. Had CSU been searching for ways to expand varsity participation opportunities for women rather than reduce them, they would have had to look no further than CSU's club sports program. If, for example, CSU had added a 23 woman varsity soccer team during the 1992-93 school year to meet the demonstrated interest of female athletes, and had at the same time maintained its women's softball team, the female participation rate at CSU would have risen to approximately 44.3%. If, hypothetically, defendants had also added a women's varsity alpine ski racing team with 15 members, female participation would have risen to 46.6%, leaving an acceptable 1.7% gap between female athletic participation and female undergraduate enrollment. *Id.* In determining the average participation figures for these two teams, the Court considered the *NCAA Gender-Equity Study* which was released in March of 1992. *See* Defendants' Exhibit BH at 9. Finally, the Court notes that there would be a reasonable expectation of intercollegiate competition for varsity teams such as women's soccer or alpine skiing given the fact that several schools within the Western Athletic Conference offer women's soccer and alpine ski teams.

The Court concludes that defendants have not met their burden of proving that they are fully and effectively accommodating the interests of women at CSU despite the under-representation of women in CSU athletics. The evidence introduced at trial shows that there are in fact women at CSU who are capable and desirous of competing in varsity sports other than those being currently offered. Plaintiffs' testimony at trial also demonstrated that there is a strong present and

future interest in maintaining women's softball as a varsity sport at CSU. Thus, the Court finds that the demonstrated interests and abilities of both of these groups of female athletes are not being fully and effectively accommodated.

4. Other Findings

Mr. Corey Johnson and Ms. Roselyn Cutler testified at trial that the primary reason the women's softball team was eliminated was to reduce a budget shortfall in CSU's athletic department. However, a financial crisis cannot justify gender discrimination. *See Cook v. Colgate Univ.*, No. 90-411, slip op. (N.D.N.Y September 28, 1992); *Favia*, slip op. at 11. Dr. Albert Yates, Mr. Johnson, and Ms. Cutler also testified that they did not intend to violate Title IX nor did they believe they were violating Title IX by their decision to cut the women's softball team. Although the Court finds that these three individuals discussed and considered Title IX before cutting the women's softball team, Title IX and the implementing regulations can be violated without a showing of specific intent to discriminate against women on the part of the decision makers for the educational institution. *See Haffer v. Temple University*, 678 F. Supp. 517, 540 (E.D.Pa. 1987); *Favia*, slip op at 11. In other words, good intentions or a misinterpretation of the law does not negate a violation of Title IX.

Conclusion

The Court concludes that defendants' decision to terminate the women's softball team constitutes a violation of Title IX, when viewed in the context of CSU's disproportionate athletic participation rates for women, defendants' failure to demonstrate a history of program expansion for women, and defendants' failure to demonstrate effective accommodation of female students' interests and abilities. The underlying mandate of this opinion is that CSU may not continue to operate an intercollegiate athletic program that provides a

disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the interests and abilities of its female students. Accordingly, a permanent injunction will issue in favor of plaintiffs and against defendants requiring defendants to reinstate the women's intercollegiate softball program and to provide the women's softball team with all of the incidental benefits accorded other varsity teams at CSU. It is thereby

ORDERED that a permanent injunction against defendants requiring them to reinstate the CSU women's softball team is hereby issued. It is

FURTHER ORDERED that the parties are to submit a status report on or before April 16, 1993.

DATED at Denver, Colorado, this ____ day of February, 1993.

BY THE COURT:

_____

ZITA L. WEINSHIENK, Judge
United States District Court

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 92-Z-1310

JENNIFER ROBERTS, et al.,

Plaintiffs,

vs.

COLORADO STATE UNIVERSITY, et al.,

Defendants.

REPORTER'S TRANSCRIPT
(Status Conference)

Proceedings before the HONORABLE ZITA L. WEINSHIENK, Judge, United States District Court for the District of Colorado, commencing at 1:25 p.m., on the 11th day of March, 1993, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES

PAMELA A. GAGEL and, KAREN E. ROBERTSON, Attorneys at Law, Kobayashi & Associates, 1700 Broadway, Suite 1900, Denver, Colorado, 80290, appearing for the plaintiffs.

WILLIAM E. THRO and MARGARET WALTON, Assistant Colorado Attorneys General, 1525 Sherman Street, 5th Floor, Denver, Colorado, 80203, appearing for the defendants.

Proceedings Recorded by Mechanical Stenography, Transcription Produced via Computer by Paul Zuckerman, 1929 Stout Street, P.O. Box 3563, Denver, Colorado 80294, (303) 629-9285.

PROCEEDINGS

THE COURTROOM DEPUTY: The matter now before the Court is Jennifer Roberts, et al., vs. Colorado State University, et al., Civil Action No. 92-Z-1310.

THE COURT: Appearances for the plaintiffs.

MS. GAGEL: Good afternoon, your Honor. Pamela Gagel and Karen Robertson from Kobayashi & Associates.

THE COURT: All right. Mr. Thro?

MR. THRO: Assistant Attorney General William Thro.

MS. WALTON: And Margaret Walton, your Honor.

THE COURT: Thank you.

I intended to just do this informally as a status conference in the jury room; but since we had so many people, I decided that there really isn't enough room in there for everybody; so we're having an informal status conference, but we're doing it here in the courtroom.

Let me just indicate to the parties that first of all, I am in trial and we're going to have to be very expeditious in trying to resolve the problems that have arisen in this case.

I then want to say to the defendants that it has been many years since I've had a party attempt to what appears to the Court -- to be to stonewall a court order the way that this has been done in this case.

And I'm not that happy with the plaintiffs, either, because I really didn't hear about it when I should have through the plaintiffs with a motion. I get information through the media, an article in the news which says that Ms. Cutler and CSU will take no steps towards reinstating women's softball until the appellate court rules on the school's request for stay of Weinshienk's order pending resolution of the full appeal.

And now I've been presented with an affidavit that someone named Kelly Miller in Mr. Johnson's office has told a mother who has a daughter who is interested in softball that the court order doesn't necessarily mean anything, the court order didn't necessarily mean the team would ever be reinstated.

In this country of laws, we follow court orders unless and until they're reversed on appeal; and that applies to CSU and it applies to the Attorney General's office.

So the reason for this conference is to see what can be done to immediately -- immediately put into effect the Court's order, which should have been done at the time of the Court's order and not stalled until today; and if we can't do something immediately, then the Court proposes to order some very specific orders giving CSU to get insurance, X number of days to hire a coach, to see if we can -- if there can be a softball season for this spring, if there is any possibility; and if there is no possibility, then for sure for the fall of '93 to get ready for the '94 season. And there has been quite a bit of material that there could be a fall season, which would mean that young women must be recruited, activities must be begun, the field must be -- if the men's basket -- men's baseball field is going to be used, as was stated to the OCR many years ago, if it's going to be

fixed over and used, that should be done.

But I don't intend to just sit and let people twiddle their thumbs in this case, and I don't intend to have the defendants do what they appear peer to be doing, which is thumbing their nose at the court order.

Mr. Thro, what can we do to get something going this spring?

MR. THRO: First, your Honor, I'd like to address some of the points that your Honor has raised.

Ms. Cutler was characterized in the Rocky Mountain News a couple of week ago as saying that CSU would not do anything until the Tenth Circuit ruled. That was a mischaracterization of what Ms. Cutler said. The plaintiffs have been informed repeatedly that this was a mischaracterization of what she said. It has never been our intention to do that.

We fully --

THE COURT: I'm happy to hear that.

MR. THRO: We fully realize that your court order, which was entered on the 18th of February, became effective on that date. Since that date, while attempting to get a stay in the Tenth Circuit unsuccessfully, we have endeavored to comply with your order to reinstate the softball program.

As we stated in our status report, the first status report, Mr. Johnson has done a great deal of investigation as to the feasibility of having a season in 1993, the spring of 1993. He contacted every Division I-A conference west of the Mississippi River and basically was told that there were no openings.

We've looked into the matter of liability insurance. We have

begun the process of hiring a coach. We are making a good faith, solid effort to comply with the Court's order. We intend to have a season in the spring of 1994, but, your Honor --

THE COURT: No, there is going to be a season in the fall of 1993, Mr. Thro.

MR. THRO: Okay. If that's what your Honor orders, then we will --

THE COURT: That's what I will order.

MR. THRO: Then we will comply with that and have a season in the -- have an exhibition season in the fall of 1993.

THE COURT: I don't see how you can be prepared to have a '94 spring competitive season, if you don't start immediately.

MR. THRO: Your Honor, we are starting immediately. We have notified the other conferences that we will be having a team. We have begun the process of hiring a coach.

THE COURT: When do you think you'll have a coach?

MR. THRO: As we said in our second status report, which was submitted to you yesterday, your Honor, we hopefully will be able to name a coach on or about June 1 of 1993.

THE COURT: Well, I had a really good idea driving home last night. It seems to me that I heard in the testimony -- you're going to have to refresh my memory -- that the baseball coach was doing fund-raising. He wasn't actually fired. He's still a CSU employee.

What about the baseball coach being acting coach between today and June 1, until you get your new coach on board?

Is that a possibility?

MR. THRO: In all honesty, your Honor, I am unsure. I could find out and we could report back to you, say, tomorrow on that.

THE COURT: Okay. If that's not a possibility --

MR. THRO: The baseball coach -- the former baseball coach is still an employee of CSU. I do know that.

THE COURT: And he'd probably like the idea of coaching a team, even if it would be a women's team.

MR. THRO: I wouldn't speculate on what he would think.

THE COURT: If he can't do it, then there should be at least some acting coach who shall fill in until you get your coach on June 1. But I think there needs to be something done right away.

Perhaps one of the senior girls can work with someone and be helpful as a coach, if there is one of the young women who is interested in a coaching career. I think there is two seniors that are going to finish in December.

MR. THRO: I believe that's correct.

THE COURT: Perhaps one of them would be interested in working with the former baseball coach or with someone else to do some coaching. But the point is there has to be something done before June 1.

MR. THRO: With respect to the coach --

THE COURT: What about the insurance? When will that be in effect?

MR. THRO: We have contacted our insurance agent. We have been told that insurance will cost approximately $51.11 per athlete for -- if we got it in effect reasonably immediately until the end of this academic year, basically until the 1st of May, the way CSU's schedule is. We just found out that information, I believe, last night or early this morning. So --

MS. ROBERTSON: What's the amount?

MR. THRO: I believe I was told 51.11. It's 51-something.

THE COURT: Now, without some recruiting, there is not going to be enough women for the 1994 competitive team. What are your plans on that?

MR. THRO: Well, your Honor, our plans on that are twofold: First, as you know, there is a softball club of about 30 members at CSU. We had testimony from some of the plaintiffs that many of the members were capable, at least in their judgment, of playing NCAA Division I softball. At the same time as we related in our status -- second status report, Mr. Johnson has contacted the High School Activities Association and has obtained a list of every high school that sponsors source softball in the State of Colorado.

We also attached a draft letter to that second status report. Mr. Johnson intends to send that letter out in the very near future, and that would identify some prospects or perhaps encourage a young woman who wanted to play softball but was debating between, say, Colorado or Colorado State to go to Colorado State.

THE COURT: Well, pending that recruiting, then, you're going to have walk-on's from the softball club try out for the team.

MR. THRO: Right, as well as the plaintiffs. And the remaining plaintiffs still form a solid core nucleus of a team. I'm assuming, of course that it is correct the plaintiffs would wish to play.

MS. GAGEL: They do, your Honor.

THE COURT: All right. Apparently with this -- I trust you've seen this affidavit that just came in. It was filed today, affidavit of Terri Cayou. I read form one paragraph of it, but apparently there is a high school student who is very interested in softball.

I'm sure there is lots more like her.

MR. THRO: I am sure that there are as well, your Honor. Under NCAA rules, we cannot recruit a high school junior until the last day of that young woman's junior year. So Ms. Cayou -- and I believe her first name is Amy -- we could not contact her until school gets out in late May or June.

Obviously, if CSU's new coach believes that she has the talent to play for us -- I mean that is obviously some prospect that we have for 1994-95.

With respect to the affidavit of Ms. Cayou's mother, Ms. Miller, who spoke with her, is a secretary to Mr. Johnson. Mr. Johnson was not in when she called.

Ms. Miller does not speak for the university. She's not a representative of the university. And I have not spoken with Ms. Miller, but I would imagine that the gist of the conversation was that Ms. Miller was telling her, you know, that we are appealing this and there is a possibility that there will not be a team, if your Honor's order is reversed on appeal.

I do not think Ms. Miller meant to convey by any stretch of the imagination that we were not going to do anything pending appeal. Indeed, I think the documentation attached to both of our status reports indicates that CSU has been doing a great deal in terms of ascertaining if the 1993 season is possible and also beginning

preparations for 1994, such as beginning the process of hiring a coach, looking into liability insurance, seeing what the Division I regulations are, checking the academic eligibility of the plaintiffs and other people who have expressed an interest in the softball team, etc.

Also, I'm reminded that with respect to our liability insurance, a CSU employee must be supervising the students in order for the insurance to be in effect, so --

THE COURT: That's why I thought it was really a pretty interesting idea that came to me to get your baseball coach out there.

MR. THRO: Well --

THE COURT: I forget his name. Maybe you could remind me.

MR. THRO: I believe his name is Mr. Mason.

THE COURT: I know there is differences, but not that many differences; and he might thoroughly enjoy it.

I noticed one of the applicants -- and plaintiffs' gave me -- or maybe you gave me letters from various applicants for coaching jobs -- one or more are men. So as with many women's teams, there may be male coaches.

MR. THRO: Yes, and I believe a substantial number of the women's fast pitch softball coaches are men. A large percentage.

THE COURT: Oh, really?

MR. THRO: I'm not sure exactly what. And we have received to date, as of this morning, nine letters of inquiry.

THE COURT: Okay. So the insurance you're going to get rolling.

MR. THRO: Right.

THE COURT: And if the Tenth Circuit reverses me -- and I am personally very doubtful they will in view of how the law seems to be going across the country -- but should they, then you can cancel the insurance. You can make sure you get the type of insurance that is cancelable.

But meanwhile, we're going to assume that this order is affirmed, not that it's going to be reversed; and we're going to proceed as though it is affirmed and we're going to proceed in such a way that we will have a competitive team in '94 and have a season in the fall of '93.

If you don't have the fall of '93 season, I don't see how you're going to have a competitive team in '94; and that's why I want some of these commitments from you.

If you're going to do this, fine. If you, CU (sic), is going to do this, fine, because I don't particularly want to set deadlines and make orders, if I don't have to; but I won't hesitate to do it if I have to.

MR. THRO: I assume your Honor is ordering us to have a fall of 1993 season.

THE COURT: Yes, I am ordering that you have a fall of 1993 season; and I'm ordering that you get a softball coach with all due speed. And I'm asking you to please ask the -- and see if you can arrange for just as an interim matter whether the baseball coach might be willing to fill in so that things can get started right away with practices and recruitment, not only of walk-on's from the softball club but also talented freshmen for next year.

Now, what are you going to do about scholarships? What's in place there?

MR. THRO: With respect to scholarships, your Honor, the core of the plaintiffs that remain at CSU -- most are on scholarships. we would propose continuing those individuals who have not already completed four years of scholarship assistance -- we would continue them at approximately the same level they are now. In other words, if a young woman is getting tuition and books, next year she would get tuition and books, subject, of course, to the university's normal academic regulations. Obviously, we're not going to give scholarships to people who are academically ineligible.

THE COURT: I understand that. But the point is you have something like nine players, and you're going to need how many to field a team? 15 or so?

MR. THRO: I believe the NCAA Division I average is around 16. Technically, you could have 9 on the field at any time, I guess, if you wanted to play shorthanded. If you had an injury, you could go with 9. I quite honestly am not sure what a practical minimum is for a team. I know the NCAA average is 16. Presumably a few are up around 20 and perhaps some are down around 12 or 13.

THE COURT: Well, whoever is going to be in charge of coaching is going to have to try to decide fairly quickly how many of the walk-ons really are going to be eligible to make the varsity team and therefore how many scholarships will have to be available for incoming other students.

I don't know if they're all going to be freshmen. Freshmen, sophomore, whoever might be willing to come on.

What plans do have you in place for getting that started? In other words, there needs to be recruitment; and to recruit, you're either going to have to use Mr. Mason or someone experienced, or the new coach, who you don't think you can get on till June 1.

MR. THRO: Right. Presumably after June 1, the new coach

will be recruiting.

As far as recruiting between now and June 1, as we said in our second status report we would propose that those letters go out. Certainly with the Tenth Circuit's decision to deny a stay, our recruiting posture is improved somewhat; but we still are in a situation where we cannot really commit to someone that for four years there will be a softball team at CSU. Certainly there will be one in the fall of '93 and one in the spring of '94. Beyond that is largely up to the appellate courts. And we feel that given the situation, it really is not practical both in terms of recruiting, nor in the interest of the young women or the university, for us to offer scholarships to -- to potential freshmen as a way of inducing them to come to CSU.

THE COURT: I don't know how this works. In view of the peculiar circumstances, can you offer a one-year scholarship, or not?

MR. THRO: Generally, scholarships are offered under NCAA rules to one year, or I think in some cases, one semester. But the -- and this was the case with the plaintiffs. As your Honor knows, however, the plaintiffs have consistently said that, you know, they were offered something for four years, even though we dispute that.

And I would think that if a young woman was given the choice of a scholarship at CSU with a possibility that she might be there for four years, there might be a team, vs. a scholarship at, say, the University of Nebraska, where there is a greater guaranty there would be a team for four years, she would be more likely to take the one at the University of Nebraska.

In short, I'm not sure how competitive we are going to be in the recruiting game until this lawsuit is finally resolved.

Also, as you Honor noted in her order, there is great interest and ability on the CSU campus in softball. Based on the affidavit that

we have, Ms. Cayou -- it appears that we can get Amy Cayou very, very easily. She's willing to come tomorrow. Assuming she has the talent to play Division I, I'm not -- and being the only Division I program in the State of Colorado, I'm not sure that it is prudent for us to offer scholarships.

THE COURT: Anything else you want to state on the record?

MR. THRO: Yes. We really need some clarification with regard to the fall season. The last time that we actually played a fall season, which was 1990, we played in a grand total of three tournaments, which I believe were four teams each, so a total of about six or seven games.

It's my understanding form speaking with Mr. Johnson, there is an NCAA maximum on the number of contests you can play. I think that maximum is like 55 or 56. Every contest that you play in the fall is one less that you can play in the spring; so if we play 20 games in the spring or 20 games in the fall, that would limit us to 35 or 36 in the spring. And, you know, you stated that you are ordering us to have a meaningful fall season; and I was wondering exactly how your Honor would define that so that we may be properly guided.

THE COURT: Well, I'm certainly not an expert. And I realize you're not, Mr. Thro; but from the -- let's see. The affidavits that we've had -- trying to think which one it is. Ms. Allison.

MS. GAGEL: Ms. Allison's supplemental affidavit, your Honor, sets forth several tournaments, and CSU has participated in a fall season before. The plaintiffs are conscious that they're just looking at participating in some tournaments and --

THE COURT: I think both you and I are going to --

MS. GAGEL: We'll have to see how many games they've played in before.

THE COURT: All of us are going to have to rely on the experts in this area.

MS. GAGEL: 10 to 12 games they've participated in the past, your Honor, in the fall season.

MS. ROBERTSON: Your Honor, Laura Bielak is here. She's one of the seniors on the team; and she did play in that '90 fall season, if you want to ask her anything about that.

THE COURT: If you want to talk to her and make an offer of proof -- I promised my trial I'd get back to them at 2:00, so we need to wind this up.

What I want to do is find out what areas we're going to proceed on and how quickly and then see if we can get either another status report or a status conference, if we need it.

We've already talked about the insurance and the coach and the fall season and the contact of Mr. Mason to see if he can fill in and get some recruiting started, consideration of the talented walk-ons from the softball club. There is going to have to be some at least limited recruiting in view of the circumstances. You may have to make it clear to the young women that you're just offering a one-year scholarship. But there has to be something, because even if you get some good walk-ons and even if you have nine members, you're still probably going to be short, maybe not for the fall but definitely for the spring season.

If you have any other ideas -- I really would like you to rethink this idea of the playing field, too, because we had an affidavit from the plaintiffs on the fact that not only are the town fields still available for practice but the university fields certainly can be redone to accommodate women.

MS. GAGEL: Two or three quick comments, if I could, your

Honor. You covered most of the areas.

As Mr. Thro said, the Tenth Circuit two hours ago denied the motion for stay.

THE COURT: Is that when it happened? Two hours ago?

MS. GAGEL: So we shouldn't have any problem with moving forward at this time.

I am concerned: All the parties who submitted affidavits for us are in the courtroom today; and Ms. Allison, who is the executive director of the National Softball Coaches Association, has told me that the efforts to hire a head coach could be speeded up substantially. Within 72 hours, they could be publicizing that position with their organization. Within six days, the defendants could get the position announcement in the NCAA News. It can go in by March 21.

They already have nine coaches who have applied for the position; and CSU, during the time that we were having the permanent injunction hearing, your Honor -- they fired their football coach and they were able to hire a new one within four weeks and on an expedited basis after talking to six candidates.

And it doesn't seem impossible to expedite this process for the very reason that your Honor talked about, the recruiting. There are tournaments coming up, state high school championship tournaments. There is a large tournament in Boulder over the July 4 weekend. There are camps that are put on by the National Softball Coaches Association in June and July, where there are lots of high school players and lots of talent that can be viewed for recruiting purposes.

And I'm certainly hopeful that some of the people on the club team could make the team. I find it interesting since the defendants put on a great deal of testimony how they didn't play at a level of intercollegiate varsity softball that they now think they can draw the

entire team from the club team. I certainly hope they can get some people from that.

THE COURT: I'm sure they can get some. I'm sure they can get some. I'm not sure they can fill in the rest of the team; but the point is that I don't know what can be done, and neither does Mr. Thro. And what I need his a commitment that somebody who does know is going to do something quickly.

It seems to me if you can get a football coach in four weeks, you should be able to get a women's softball coach in four weeks, Mr. Thro. And if you can't, if you want to take a little more time with it, then I would feel comfortable -- I don't know how the plaintiffs feel, because I just threw this at them; but an experienced coach like the man who did coach the men's baseball team might really enjoy being an interim coach and trying to get this woman's fast softball team off the floor and going.

MS. GAGEL: Your Honor, I think it's a great idea -- I haven't talked to the plaintiffs -- at least to get him going and get him on the practice field.

The one last point I'd like to raise is about the scholarships that Mr. Thro addressed. There is one plaintiff, Heather Nakasone, who was supposed to receive a scholarship this year, but the team was not in place. I heard Mr. Thro to say that he was talking about maybe scholarships at some level to those who are receiving some who were receiving them before. He certainly is counting Heather Nakasone as one of plaintiffs, as one of the people remaining there to play softball; and I hope they'll be looking at each individual's situation as to grants and aid. And I'd like to get that commitment from them, because they're trying to make plans as to what they're going to do.

THE COURT: And that has to be done immediately, so that these students don't have to make a decision --

MS. GAGEL: Otherwise, they go home May 15 from finals and be in the same situation they were a year ago.

THE COURT: Let's see if we can have these decisions made by at least before the end of the school year, Mr. Thro.

What is the end of the school year?

MR. THRO: I think --

THE COURT: Is it May 15?

MR. THRO: Approximately.

Your Honor, with -- I'm unclear as to how you want us to proceed on the coach. The six-week time table that we outlined in our second status report is the university's normal procedure for filling a vacancy. Obviously, if you want to order us to disregard the university's normal procedure, we will do so, but --

THE COURT: Six weeks isn't June 1.

MR. THRO: Six weeks are -- a six week process with respect to applications. We intend to announce the position on April 1. Applications will then be due approximately May 15. There will then be a two-week interview time.

One of the problems we have in hiring coaches, your Honor, is many of these -- in fact, I think virtually everyone who has expressed an interest is currently involved with the season, this being softball season; so it's not very conducive to bring someone in for an interview if they're playing a competitive schedule.

In contrast, the situation with Coach Bruce and Coach Lubbick occurred after most teams had completed their regular season football schedule; and therefore, more people were available.

MS. GAGEL: Their seasons will be completed, I'm told by Ms. Allison, by the second week in May. As she stated in her affidavit, your Honor, there are a number of those coaches who are ready to come immediately. There is nothing holding them up.

THE COURT: Are we clear that there is no possibility of a spring, '93 season? Is that something that -- I don't want to require something that's an impossibility; but if there is some chance of getting a team for spring, '93 season, I'd like to talk about that.

MS. GAGEL: We would have loved to also, your Honor. There was a very small window of opportunity when the order came out. Some of the WAC teams at that time, we had been told by the WAC assistant commissioner, had some openings in their schedule; but things didn't move along at that point in time. The schedules already started for the spring, and a lot of the plaintiffs don't want to use a year of eligibility on a season that's not going to be all set. They save a year of eligibility.

THE COURT: All right.

MS. ROBERTSON: Your Honor, if I might address one thing Mr. Thro just raised, Sonny Lubbick, who was the football coach hired, came from the Miami Hurricanes. He was hired before the Hurricanes finished their season. And the newspaper article reported that they allowed him to remain at Miami and review film before their national championship game with Alabama, but he was hired long before the end of that season.

THE COURT: Because so many things really depend on the coach, its appears to me that the time limit, the suggested time of June 1, should be speeded up, because there has to be a coach in order to do the recruitment. Let's either get someone on board -- take your six weeks -- by the end of April, or lets get someone like Mr. Mason out there who is able to do the recruitment and the training based on his experience in baseball. And he is an employee,

I take it of CSU.

MR. THRO: Yes, he is, your Honor.

THE COURT: And therefore would fulfill your insurance requirements.

MR. THRO: Yes, he will. I believe that s correct.

THE COURT: So one or the other. Either have the new coach in six weeks --

MR. THRO: Or Mr. Mason.

THE COURT: -- or have Mr. Mason filling in so he can start the recruitment and have a new coach, then, by June 1.

MR. THRO: If Mr. Mason is somehow unavailable, is some other CSU employee who would be qualified --

THE COURT: I don't know who you have that's qualified to coach. You know, maybe a track coach would be able to, or maybe -- I don't know. Basketball? I really have no idea.

MS. GAGEL: Your Honor, I think --

THE COURT: Maybe some of the young women have an idea if there is anyone out there who would be suitable as a coach.

What about the field and the playing areas? Can you work together on that? It seems to me that's a minor thing; and I know I heard your whole story about why a basketball field isn't a softball field; but it seems to me even after hearing it that there can be some changes made so it can be used together with the available fields that are in Ft. Collins.

MS. GAGEL: Your Honor, I'm happy to sit down with Mr. Thro and try and go through what needs to be expedited.

The one final thing I would address is the athletic department has not contacted any of the plaintiffs since the order went into effect. It's been three weeks now, and I would ask that they address that on an expedited basis so that these plaintiffs know where they stand. I mean there has just been no contact with them.

THE COURT: Okay. I would hope that the attorneys, too, could talk about this. Maybe because of the lawsuit, CSU is concerned about making the contact. But certainly I have no objection if the athletic department contacts the women athletes and let's them know what's going to happen.

I would assume the women softball players that have been on the team will be the core of the new team, because people that come on either by being recruited or walk-ons or lateral transfers are certainly going to be new people; and the women that are on should know what's happening.

Is that something that you can talk about also, Ms. Gagel?

MS. GAGEL: I hope so, your Honor. I'm happy to do it.

MR. THRO: Your Honor, with respect to recruiting, prior to the decision to eliminate the softball and baseball perhaps, CSU had decided that in the future, scholarships for the softball team would be decided on an in-state rather than out-of-state basis. This meant that it was still possible to recruit someone out of state, but the amount of money would be in-state. So getting somebody from out of state would cost them two scholarships.

This is not unusual among CSU's nonrevenue sports, but it does represent a change from the national recruiting patterns that we saw prior to 1991, and I obviously do not want to get into trouble

with you, if CSU pursues a Colorado-only recruiting policy and you had intended a national recruiting policy.

THE COURT: What does -- what does the --

MS. GAGEL: Your Honor, this is the first --

THE COURT: What are the requirements as far as recruiting? Does it have to be on a national basis, or can state people be preferred, or considered?

MS. GAGEL: State people can probably be preferred. And one of the problems that CSU will face in recruiting, my understanding, your Honor, is many Colorado students have already signed in the early signing period in November; so the pool of available talent in Colorado, since we're moving into the end of the second recruiting season -- there may not be all the people they need for the team there.

They've always recruited nationally. I'm not saying not to recruit in Colorado. We absolutely encourage it.

THE COURT: Why can't we leave it at this: The first big effort will be to find Colorado women that are eligible. If you can't, you may have to go national.

But I noticed in the Big 8 tournament that the Oklahoma and the Oklahoma State women's basketball teams are almost totally Oklahoma women; and so they are recruited from in state, if possible. There may be a couple Texans on each team; but other than that, they're Oklahoma.

So I would think that there is a lot of talent in Colorado; and try to use that talent, if you can.

MS. GAGEL: Your Honor, I don't disagree with that at all.

I think we'd all like to move toward that.

My concern is what I just heard from Mr. Thro is he's going to change the rules of the game on some of the current plaintiffs who receive out-of-state tuition; and I'm not clear on how they intend to deal with those people from out of state.

MR. THRO: Your Honor, we are not going to change the rules of the game with respect to the out-of-state plaintiffs. This was a policy which was to go with -- was decided on in, I believe, October of 1991 and was to apply to the future.

Obviously, those people that are in state or that are out of state are going to continue to receive out-of-state aid.

A out-of-state scholarship at CSU costs approximately twice what an in-state scholarship costs; so when we budget for the softball team as to how much money is going to spent on scholarships, it makes a huge difference.

THE COURT: You know, it's nothing that I can tell you. There may be a great number of extremely talented women from Colorado athletes who are available for scholarships. There may be none. I don't know that. So I think there has to be some efforts.

I think what I'd like to do is keep a tight hold on this case to make sure we don't have any more problems and maybe set this down, let you talk, let you see what you can work out, but set it down for another status hearing/conference. And I don't even care if I just have the attorneys. If everybody else want to come, that's fine; but I primarily want to hear what's happening in a short period of time, three weeks, four weeks from now, just to see what has been accomplished, what -- Maybe I could have a report, too, to know whether we're going to have a coach by the end of April, or we're going to have an interim coach, someone like Mr. Mason or someone else that's really experienced at coaching, and then push it till June.

BEST AVAILABLE COPY

And we absolutely need someone like a coach or like Mr. Mason to get involved in the recruiting.

MS. GAGEL: Your Honor, I'd love to set a report much sooner than three weeks, to make sure that we're moving forward quickly.

THE COURT: That's fine. You want to? Fine. A week?

MS. GAGEL: One week.

THE COURT: When do you want, Ms. Gagel?

MS. GAGEL: That would be great. Thank you, your Honor.

MR. THRO: Your Honor, I have a couple of other questions just to clarify.

THE COURT: Surely.

MR. THRO: With regard to recruiting, we talked about the problems of offering -- potentially offering a scholarship to someone. Do you want -- in recruiting, are you ordering us to offer scholarships, or is that within our discretion, or --

THE COURT: You think you're going to be able to recruit varsity talent without scholarships?

MR. THRO: Being the only Division I school in the State of Colorado that has a softball program, perhaps.

MS. GAGEL: Your Honor, CSU didn't worry about this. 7 of the 18 people on the team when they terminated the team were freshmen, and it didn't seem to concern them then. Mr. Thro has suggested scholarships are limited to one year; so if someone is going to Nebraska, I guess they anticipate only one year of a scholarship,

just the same as they would at CSU.

I'm not quite certain what the problem is, since that's been their position throughout this: that a scholarship is for one year.

MR. THRO: Your Honor, I am only attempting to make absolutely certain that we fully understand your order. I mean if we go out and attempt to recruit and do not offer scholarships and no one wants to sign with CSU --

THE COURT: If you can get top flight women athletes for this team without offering scholarships, more power to you. You'll save the school a lot of money. I'm not sure you can. I don't want this to be done in a slipshod manner. I think when my order indicated that the softball team was to be reinstated and we want to make sure they have a good season, there is to be good players. You're not just to get players that can't live up to the expectations of being top flight varsity players.

Now, I don't know who is out there. Here's a young lady who is now a junior in high school whose mother says she really want to go to CSU. Now, whether she wants some sort of a scholarship, I don't know.

MR. THRO: I imagine when NCAA rules allow that, coaches might be talking to her; but, you know, --

THE COURT: I wish I could order enthusiasm, because if I could, I would order that CSU be enthusiastic about complying with the Court's order. That's what I really want.

MR. THRO: Your Honor, I know the hour is late; but if I may clarify my notes on your order so that we know what is happening, you are ordering us to hire a new head coach by the end of April, or to have an interim head coach in place. You're ordering us to

have --

THE COURT: Well, if you have an interim head coach in place, then you've got a little time, till June.

MR. THRO: Do you want us to have an interim head coach from now till late April, if that's the route we decide

THE COURT: I'd sure like to have somebody there, because I think practice should start tomorrow.

MR. THRO: Your are also ordering us to have a fall season of at least some duration, but the length of that is up to us?

THE COURT: Yes, and I think you may want to consult with someone like Ms. Allison or someone who is knowledgeable, yes.

MR. THRO: And you are ordering us to actively recruit.

THE COURT: Yes. And prepare a field and make sure that you do what you have to do to get a team out there, which means if you need equipment and uniforms, you're going to have to so a few patches on the uniforms.

MR. THRO: Thank you, your Honor.

THE COURT: Status report in one week?

MR. THRO: One week.

MS. GAGEL: Thank you, your Honor.

THE COURT: Do you want to set another hearing, or not?

Why don't I see what the status reports say; and I'm not going to hesitate to set a hearing, if I have to.

MS. GAGEL: Let's see if we can make some progress.

THE COURT: Please stay in close touch with the defendants. And I wish I had been on top of this a little earlier in realizing that nothing was happening; and I want to make sure that the plaintiffs stay on top of this and let me know if there is any problems.

MS. GAGEL: Understood, your Honor.

THE COURT: Thank you very much.

Court is in recess.

(Thereupon, the hearing was concluded and the Court recessed at 1:10 p.m.)

* * * *

REPORTER'S CERTIFICATE

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

Dated at Denver, Colorado, this 12th day of March, 1993.

APPENDIX C

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

JENNIFER ROBERTS; JULIE OSBORNE; JANET BRUMBELOW; LAURA BIELAK; SARA STOUT; AMY RECOUPER; JENNIFER JACOBS; MALIA KUENZLI; STACIE STAFFORD; HEATHER NAKASONE; KIM JOHNSON; AIMEE RICE; LISA MIZE,	)	
Plaintiffs-Appellees,	)	
v.	)	
COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the entity charged with the general control and supervision of Colorado State University,	)	No. 93-1052
Defendant-Appellant.	)	
COLORADO STATE UNIVERSITY,	)	
Defendant.	)	
JENNIFER ROBERTS; JULIE OSBORNE; JANET BRUMBELOW; LAURA	)	

BIELAK; SARA STOUT; AMY RECOUPER; JENNIFER JACOBS; MALIA KUENZLI; STACIE STAFFORD; HEATHER NAKASONE; KIM JOHNSON; AIMEE RICE; LISA MIZE,

Plaintiffs-Appellees,

v. No. 93-1086

COLORADO STATE BOARD OF AGRICULTURE, in its capacity as the entity charged with the general control and supervision of Colorado State University,

Defendant-Appellant.

Appeals from the United States District Court
for the District of Colorado
(D.C. No. 92-Z-1310)

Before McKAY, Chief Judge, LOGAN and ANDERSON, Circuit Judges.

LOGAN, Circuit Judge.

The Colorado State Board of Agriculture (SBA or defendant)[1]

---

[1] Although Colorado State University (CSU) is also a named defendant, as we discuss hereafter it is not a party to the appeal. Because we also hold that the Colorado State Board of Agriculture (SBA) is a proper appellant, the entity in financial control of CSU and apparently the only entity capable of

appeals the decision of the district court finding that it violated Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 - 1688, and ordering it to reinstate the women's fast pitch softball team at Colorado State University (CSU) with all of the incidental benefits of a varsity team.

Plaintiffs, CSU students and former members of the fast pitch softball team, brought suit in their individual capacities[2] against SBA and CSU in June 1992 after CSU announced that it was discontinuing the varsity fast pitch softball program. In February of this year the district court found that SBA and CSU had violated Title IX, and issued a permanent injunction reinstating the softball program. Approximately three weeks later, the district court held a status conference and, in the face of apparent foot-dragging by defendant, amplified its earlier orders to require defendant to hire a coach promptly, recruit new members for the team, and organize a fall season. This court denied a motion for a stay but expedited the appeal.

Plaintiffs first contest our jurisdiction to hear these appeals. On the merits, defendant contends that the district court erred in finding a Title IX violation. Defendant also maintains that even if the verdict was correct, the district court abused its discretion when it ordered reinstatement of the softball team and required defendant to follow

---

being sued under state law, we use the singular "defendant" in this opinion with the understanding that SBA's involvement in this appeal concerns its administration of CSU.

We grant the motion of the Trial Lawyers for Public Justice and the National Association for Girls and Women in Sport to file an amicus brief. We grant that part of plaintiffs' motion to clarify the caption of the appeal to show CSU as a defendant only instead of as an appellant. We deny all other motions before us.

[2] Title IX contains an implied private cause of action. *Cannon v. University of Chicago*, 441 U.S. 677, 717 (1979).

specific directions in effecting that reinstatement rather than affording defendant the opportunity to present a plan that would bring it into compliance with Title IX.

We review a district court's interpretations of law de novo, *Eastman Kodak Co. V. Westway Motor Freight*, 949 F.2d 317, 319 (10th Cir. 1991), and its findings of fact for clear error. *Mid-America Pipeline v. Lario Enters.*, 942 F.2d 1519, 1524 (10th Cir. 1991). We review a district court's choice of equitable remedies for abuse of discretion. *Keyes v. School Dist. No. 1*, 895 F.2d 659, 665 (10th Cir. 1990), *cert. denied*, 498 U.S. 1082 (1991).

I

We consider first the challenges to our jurisdiction over these appeals. Plaintiffs maintain that because defendant failed to name CSU as a party in its notice of appeal, and because parties seeking appellate review must join all of their co-plaintiffs or co-defendants, we must dismiss this appeal. There is no substance to plaintiffs' argument that SBA cannot appeal the district court's decision without joining CSU as its co-appellant. This archaic practice of summons and severance was abolished by original Civil Rule 74 in 1937, *see* 9 James W. Moore et al., *Moore's Federal Practice* ¶ 203.27 (1993), and was "assumed to be sufficiently obsolete as no longer to require pointed abolition" when the Federal Rules of Appellate Procedure were adopted. Fed. R. App. P. 3 advisory committee's note (1967 adoption).

CSU, not having been named in the notice of appeal, is not a party to the appeal. *See Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 314 (1988). The real question, however, is whether SBA, which is named, is the proper party appellant to require us to reach the merits of the issues raised. Plaintiffs argue that because CSU has not appealed, the district court's order is final and enforceable against it, and SBA's appeal is irrelevant. In light of the statutory scheme

creating SBA and CSU, however, CSU is powerless to comply with the district court's order on its own and the relief plaintiffs seek may only be obtained against SBA. The Colorado legislature established CSU and SBA as separate entities, Colo. Rev. Stat. § § 23-30-101, 23-31-101. While SBA was constituted as "a body corporate, capable in law of suing and being sued," *id.* § 23-30-102, the statutes and constitutional provisions pertaining to CSU contain no similar grant. *See id.* § § 23-31-101 to 136; Colo. Const. art. VIII, § 5(1). Furthermore, although CSU maintains control over certain internal institutional policies, *see, e.g.*, Colo. Rev. Stat. § 23-31-104 (faculty and board together determine curriculum); *id.* § 23-31-114 (faculty establishes rules of governance and discipline), SBA has general control and supervisory power including "power to adopt ... regulations ... to secure the successful operation of the university," *id.* § 23-31-108, hiring authority, *id.* § 23-31-109, and complete financial control over CSU, *id.* § 23-31-120; Colo. Const. art. VIII, § 5(2); *see also Lewis v. State Bd. of Agriculture*, 335 P.2d 546, 550 (Colo. 1959). Under this scheme, even if CSU were capable of being sued, any adverse verdict or remedial order entered against CSU concerning hiring or funding would have to operate against SBA. Thus, CSU was an unnecessary party to the suit to begin with, and we see no legal impediment to reaching the merits with only SBA as appellant.

Plaintiffs also dispute SBA's right to appeal separately the measures ordered at the March 1993 status conference. Defendant counters with an argument that because it had appealed the injunctive order the district court was divested of jurisdiction to make any change in the injunction. We are satisfied that we have jurisdiction to review the measures ordered at the status conference either through defendant's appeal of the original jurisdiction order or its separate appeal of the specific obligations imposed at the March hearing. The district court refused a stay of the injunction, and this court also refused a stay pending appeal. The district court's injunction required it to supervise a continuing course of conduct. Absent a stay "an appeal from the supervisory order does not divest the district court of

jurisdiction to continue its supervision." *Hoffman v. Beer Drivers & Salesmen Local Union No. 888*, 536 F.2d 1268, 1276 (9th Cir. 1976). *See also NLRB v. Cincinnati Bronze, Inc.*, 829 F.2d 585, 588 (6th Cir. 1987). Indeed, Fed. R. App. P. 8(a) expressly recognizes this continuing power of a district court as it requires an application for an order "modifying ... an injunction during the pendency of an appeal" to be made in the first instance to the district court. *See also* Fed. R. Civ. P. 62(c) (district court may modify injunction during pendency of an appeal).

In light of the district court's continuing authority, if the specific directives imposed at the March status conference amount to "modifying" the injunction, they are subject to appeal under the express terms of 28 U.S.C. § 1292(a)(1). If they merely implement the original injunctive order or "clarify" it, they are not separately appealable. *See Motorola Inc. v. Computer Displays Int'l*, 739 F.2d 1149, 1155 (7th Cir. 1984) (An order is a clarification if it "does not change the parties' original [legal] relationship, but merely restates that relationship in new terms."); *Mikel v. Gourley*, 951 F.2d 166, 169 (8th Cir. 1991); *Sierra Club v. Marsh*, 907 F.2d 210, 212 - 13 (1st Cir. 1990). In that event, however, since the injunction itself is properly before us, we see no difficulty in reviewing the specific requirements -- to hire a coach, recruit players, and schedule a fall season -- that the district court imposed on defendant.

II

Defendant maintains that, as a matter of law, it did not violate Title IX. Title IX provides that: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a). Since 1988, Title IX has applied to recipients of federal funds in all of their operations. *Id.* § 1687. The statute delegated to the Secretary of Health, Education and Welfare (now the

Secretary of Education)[3] the responsibility to promulgate regulations implementing Title IX, including specifically "intercollegiate athletic activities." Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (1974). Title 34, § 106.41, of the Code of Federal Regulations applies Title IX to college athletics.

A

This controversy concerns one subpart of the regulations implementing Title IX. 34 CFR § 106.41(c) provides:

> A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director [of the Office for Civil Rights] will consider, among other factors:
>
> (1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes[.]

Although § 106.41(c) goes on to list nine other factors that enter into a determination of equal opportu..ity in athletics,[4] an institution may violate Title IX simply by failing to accommodate effectively the

---

[3] After Title IX was passed, the Department of Health, Education, and Welfare was divided into the Department of Health and Human Services and the Department of Education; the latter, acting through the OCR, is now the agency charged with administering Title IX.

[4] These other factors include provision of equipment and supplies, scheduling of game and practice times, travel allowances, assignment of coaches and tutors, and provision of locker room and practice facilities. 34 CFR § 106.41(c)(2)-(10).

interests and abilities of student athletes of both sexes. *See Cohen v. Brown Univ.*, No. 92-2483, 1993 U.S. App. LEXIS 7912, at *21 - 22 (1st Cir. Apr. 16, 1993); *Favia v. Indiana Univ. of Penn.*, 812 F. Supp. 578, 584 - 85 (W.D. Pa. 1993); *see also* 44 Fed. Reg. 71,413, 71,415 - 17 (1979) (HEW Title IX Intercollegiate Athletics Policy Interpretation, describing the three major areas of regulatory compliance as "Athletic Financial Assistance (Scholarships)," "Equivalence in Other Athletic Benefits and Opportunities," and "Effective Accommodation of Student Interests and Abilities"); Office for Civil Rights, Department of Education, Title IX Athletics Investigator's Manual 7 (1990) [hereinafter Investigator's Manual] ("[a]n investigation may be limited to less than all three of these major areas").

In 1979, the Department of Health, Education, and Welfare issued a policy interpretation explaining the ways in which institutions may effectively accommodate the interests and abilities of their student athletes. *See* Policy Interpretation, 44 Fed. Reg. 71,413 (1979). We defer substantially to an agency's interpretation of its own regulations. *Martin v. Occupational Safety & Health Review Comm'n*, 111 S. Ct. 1171, 1175 (1991). This is especially so when, as here, they are effectively legislative, pursuant to a statutory delegation. The Policy Interpretation delineates three general areas in which the OCR will assess compliance with the effective accommodation section of the regulations, as follows:

a. The determination of athletic interests and abilities of students;
b. The selection of sports offered; and
c. The levels of competition available including the opportunity for team competition.

44 Fed. Reg. at 71,417. Despite some similar and overlapping language in the Policy Interpretation's discussion of these three broad policy areas, a close reading of the application sections immediately

following this initial statement of policy reveals that plaintiffs' claim concerns their opportunity to participate in team competition. The OCR assesses effective accommodation with respect to opportunities for intercollegiate competition by determining:

> (1) Whether intercollegiate level participation opportunities for male and female students are provided in numbers substantially proportionate to their respective enrollments; or
>
> (2) Where the members of one sex have been and are under-represented among intercollegiate athletes, whether the institution can show a history and continuing practice of program expansion which is demonstrably responsive to the developing interest and abilities of the members of that sex; or
>
> (3) Where the members of one sex are under-represented among intercollegiate athletes, and the institution cannot show a continuing practice of program expansion such as that cited above, whether it can be demonstrated that the interests and abilities of the members of that sex have been fully and effectively accommodated by the present program.

Id. at 71,418.

In effect, "substantial proportionality" between athletic participation and undergraduate enrollment provides a safe harbor for recipients under Title IX. In the absence of such gender balance, the institution must show that it has expanded and is continuing to expand opportunities for athletic participation by the under-represented gender, or else it must fully and effectively accommodate the interests and abilities among members of the under-represented gender.

In addition to assessing whether individuals of both sexes have

the opportunity to compete in intercollegiate athletics, the OCR also examines whether the quality of competition provided to male and female athletes equally reflects their abilities. This will depend on whether, program wide, the competitive schedules of men's and women's teams "afford proportionally similar numbers of male and female athletes equivalently advanced competitive opportunities," *id.*, or "[w]hether the institution can demonstrate a history and continuing practice of upgrading the competitive opportunities available to the historically disadvantaged sex as warranted by developing abilities among the athletes of that sex." *Id.* However, "[i]nstitutions are not required to upgrade teams to intercollegiate status or otherwise develop intercollegiate sports absent a reasonable expectation that intercollegiate competition in that sport will be available within the institution's normal competitive regions." *Id.*

B

The district court found that plaintiffs met their burden of showing that defendant could not take shelter in the safe harbor of substantial proportionality.[5] The district court reviewed a substantial

---

[5] Although the Policy Interpretation does not clearly place the burden of showing a disparity between the gender composition of a school's athletic program and the gender composition of its overall enrollment on the party challenging the school's Title IX compliance, the statute itself provides some guidance. Title IX provides that its prohibition against gender discrimination in federally funded programs shall not

> be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: *Provided*, That this subsection shall not be construed to prevent the consideration

quantity of statistical data, and made the undisputed finding that following the termination of the varsity softball program, the disparity between enrollment and athletic participation for women at CSU is 10.5%. Defendant maintains that, as a matter of law, a 10.5% disparity is substantially proportionate.[6]

The OCR has instructed its Title IX compliance investigators that "[t]here is no set ratio that constitutes 'substantially proportionate' or that, when not met, results in a disparity or a violation." Investigator's Manual at 24. However, in the example immediately preceding this statement, the Manual suggests that substantial proportionality entails a fairly close relationship between athletic participation and undergraduate enrollment.[7] Furthermore, in a Title IX compliance review completed in 1983, the OCR found that CSU's athletic participation opportunities for men and women were not substantially proportionate to their respective enrollments. During the three years that were the subject of that review, the differences between women enrolled and women athletes were 7.5%, 12.5%, and 12.7%. The district court relied on these sources, as well as expert testimony that a 10.5% disparity is statistically

---

> in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists....

20 U.S.C. § 1681(b). Because an institution is not required to maintain gender balance, it is fair to conclude that proving an imbalance lies with the plaintiff.

[6] We reject defendant's argument that the district court's decision implicitly requires CSU to maintain parity between women's athletic participation and women's enrollment. The district court applied all three prongs of the effective accommodation test; CSU's failure to meet substantial proportionality did not preclude it from complying with Title IX in either of the other two approved methods.

[7] "[I]f the enrollment is 52% male and 48% female, then, ideally, about 52% of the participants in the athletics program should be male and 48% female...." Investigator's Manual at 24.

significant, in concluding that CSU could not meet this first benchmark. *See also Cohen v. Brown Univ.*, 809 F. Supp. 978, 991 (D.R.I. 1992) (11.6% disparity not substantially proportionate) *aff'd*, No. 92-2483, 1993 U.S. App. LEXIS 7912 (1st Cir. Apr. 16, 1993). Without demarcating further the line between substantial proportionality and disproportionality, we agree with the district court that a 10.5% disparity between female athletic participation and female undergraduate enrollment is not substantially proportionate. The fact that many or even most other educational institutions have a greater imbalance than CSU does not require a different holding.

C

The district court also found that defendant could not prove a history and continuing practice of expansion in women's athletics at CSU.[8] Defendant argues that the district court should have given greater weight to its dramatic expansion of women's athletic opportunities during the 1970s. In essence, defendant suggests reading the words "continuing practice" out of this prong of the test. In support of this position, defendant offers anecdotal evidence of enforcement at other institutions, and the OCR's 1983 finding of compliance for CSU, which was contingent upon CSU's fulfilling the provisions of a plan that CSU never met.

Although CSU created a women's sports program out of nothing in the 1970s, adding eleven sports for women during that decade, the district court found that women's participation opportunities declined steadily during the 1980s. Furthermore, although budget cuts in the last twelve years have affected both men and women athletes at CSU, the district court found that women's

[8] Here the language of the Policy Interpretation clearly places the burden of proof on the institution: "whether the institution can show a history and continuing practice of program expansion." 44 Fed. Reg. 71,418.

participation opportunities declined by 34%, whereas men's opportunities declined by only 20%. The facts as found by the district court (and largely undisputed by defendant) can logically support no other conclusion than that, since adding women's golf in 1977, CSU has not maintained a practice of program expansion in women's athletics, and indeed has since dropped three women's sports. *See* Appellant's Opening Brief at 7 - 8 n.4.

We recognize that in times of economic hardship, few schools will be able to satisfy Title IX's effective accommodation requirement by continuing to expand their women's athletics programs. Nonetheless, the ordinary meaning of the word "expansion" may not be twisted to find compliance under this prong when schools have increased the relative percentages of women participating in athletics by making cuts in both men's and women's sports programs. Financially strapped institutions may still comply with Title IX by cutting athletic programs such that men's and women's athletic participation rates become substantially proportionate to their representation in the undergraduate population.[9]

D

---

[9] *See Cohen*, 1933 U.S. App. LEXIS 7912, at *28 n.15:

> Title IX does not require that a school pour ever-increasing sums into its athletic establishment. If a university prefers to take another rout, it can also bring itself into compliance with the first benchmark of the accommodation test by subtraction and downgrading, that is, by reducing opportunities for the over-represented gender while keeping opportunities stable for the under-represented gender (or reducing them to a much lesser extent).

The district court found that defendant could not demonstrate that CSU's athletic program fully and effectively accommodated the interests and abilities of women athletes. Here we hold that the district court improperly placed the burden of proof on defendant. Because a Title IX violation may not be predicated solely on a disparity between the gender composition of an institution's athletic program and the gender composition of its undergraduate enrollment, *see* 20 U.S.C. § 1681(b), plaintiff must not only show that the institution fails on the first benchmark of substantial proportionality but also that it does not fully and effectively accommodate the interests and abilities of its women athletes. *See Cohen*, 1993 U.S. App. LEXIS 7912, at *14. Further, an institution would be hard-pressed to establish the full and effective accommodation of the interests and abilities of its women athletes in the abstract. The ultimate burden must lie with the plaintiffs to show that they have been "excluded form participation in, [or] denied the benefits of" an athletic program "on the basis of sex." 20 U.S.C. § 1681(a). However, if plaintiffs establish that their interests and abilities are not being accommodated by the university's athletic program, the institution may still decline to upgrade or create an intercollegiate team if there is no reasonable expectation of competition for that team within the institution's normal competitive region.[10]

---

[10] Defendant improperly relies on a provision of the Policy Interpretation pertaining to the second broad policy area, the selection of sports offered, which provides that effective accommodation requires establishing a team only if "[t]here is sufficient interest and ability among the members of the excluded sex to sustain a viable team and a reasonable expectation of intercollegiate competition for that team." 44 Fed. Reg. at 71,418. This language applies only when a university sponsors a team in a noncontact sport for one sex, but not for the other.

The Investigator's Manual addresses and obviates the possibility that one talented softball player could force the creation of an entire team. The Manual instructs investigators assessing accommodation of interests and abilities under the third prong of the effective accommodation test to review "whether the institution failed to accommodate 'expressed interest,' for

The district court's misallocation of the burden of proof is not fatal in this case. Faced with a similar situation, the First Circuit held that it could make the proper legal determination because the record on this point had been fully developed. *See Cohen*, 1993 U.S. App. LEXIS 7912, at *46 - 47. In the case before us the district court made extensive findings concerning the unmetabilities and interests of the plaintiff softball players, and the feasibility of their organizing a competitive season of play. The district court credited the plaintiffs' testimony regarding their commitment to softball, the recognition they have achieved both as a team and as individuals, and the substantial interest in softball among first year CSU students who are participating in a club team. The district court also credited testimony that softball is increasing in popularity among high school students in Colorado. Although CSU's traditional rivals do not field softball teams, there is no dispute that before the CSU softball team was terminated it played a competitive schedule within its athletic conference. Because the record is more than adequate in this regard, we are able to consider the question of effective accommodation, placing the burden of proof on the plaintiffs.

The heart of the controversy is the meaning of the phrase "full and effective accommodation of interests and abilities." Defendant maintains that even if there is interest and ability on the part of women athletes at CSU, the university is obliged to accommodate them only to the extent it accommodates men. Thus, the argument goes, plaintiffs cannot be heard to complain because both women's softball and men's baseball were eliminated in the last round of cuts and there are more disappointed male than female athletes at CSU. The First Circuit rejected this position in *Cohen*, and so do we. "[T]his benchmark sets a high standard: it demands not merely some

---

example, athletes of the under-represented sex participating in a club sport express interest in intercollegiate ... competition *or sufficient numbers of individuals to form a team request that a sport be offered.*" Investigator's Manual at 25 (emphasis added).

accommodation, but full and effective accommodation. If there is sufficient interest and ability among members of the statistically under-represented gender, not slaked by existing programs, an institution necessarily fails this prong of the test." *Id.* at *26.

Based on the district court's subsidiary findings of fact, we conclude that plaintiffs met the burden of showing the CSU has not accommodated their interests and abilities fully and effectively. Questions of fact under this third prong will be less vexing when plaintiffs seek the reinstatement of an established team rather than the creation of a new one.[11] Here, plaintiffs were members of a successful varsity softball team that played a competitive schedule as recently as the spring of 1992. Although apparently four plaintiffs have transferred and one has been dismissed, seven or eight plaintiffs remain at CSU for at least part of the 1993-94 school year and would be eligible to play on a reinstated team. We agree with the district court that CSU fails the third prong of effective accommodation test.[12]

---

[11] *See Cohen*, 1993 U.S. App. LEXIS 7912, at *47:

> Although the full and effective accommodation of athletic interests is likely to be a complicated issue where allegedly under-represented plaintiffs sue to force a university to create a neoteric team or upgrade the status of a club team, there is unlikely to be any comparably turbid question as to interest and ability where, as here, plaintiffs are seeking merely to forestall the interment of healthy varsity teams.

(citation omitted).

[12] The OCR agrees that in situations such as the one presented here, a violation is likely:

> OCR investigative experience indicates that

E

Finally, defendant argues that the district court erred in holding that plaintiffs were not required to show discriminatory intent. Defendant reasons that because Title IX was modeled on Title VI of the Civil Rights Act of 1964, 42 U.S.C. § § 2000d to -4a, and because discriminatory intent is required to prove a violation of Title VI, *see Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582, 608 n.1 (1983) (Powell, J., concurring), proof of a Title IX violation must therefore also require intentional discrimination.

Defendants neglect to consider the additional holding of

> where budget restrictions have led a recipient to eliminate sports previously offered, there is frequently a compliance problem with this program component. The tendency is for institutions to eliminate a sport previously offered to women who are already under-represented in the institutions' athletic programs. The result has been that women are now more disadvantaged by the elimination of a women's team despite sufficient interest and ability to sustain a viable team. In this situation, the institution may well be in violation of this program component. In effect, the participation rates of men and women are not proportionate to their enrollment rates such that women are under-represented in the athletics program, and the institution is not meeting expressed interests and abilities of female students. Therefore, the institution is not equally effectively accommodating the athletic interests and abilities of male and female students.

Investigator's Manual at 27.

Guardians, that "although Title VI itself requires proof of discriminatory intent, the administrative regulations [under Title VI] incorporating a disparate-impact standard are valid." *Id.* at 584 n.2 (opinion of White, J.). Plaintiffs' complaint alleges violations both of Title IX and of the implementing regulations. If we accept defendant's analogy to Title VI, then *Guardians* would permit us to find a violation of Title IX's regulations without proof of discriminatory intent. *See Haffer v. Temple Univ.*, 678 F. Supp. 517, 539-40 (E.D.Pa. 1987), *modified*, 1988 U.S. Dist. LEXIS 761.[13]

Further, despite the fact that Title IX was explicitly modeled on Title VI, this court has held that Tile VII of the Civil Rights Act of 1964, 42 U.S.C. § § 2000e to -17, is "the most appropriate analogue when defining Title IX's substantive standards, including the question of whether 'disparate impact' is sufficient to establish discrimination under Title IX." *Mabry v. State Bd. of Community Colleges & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir.), *cert. denied*, 484 U.S. 849 (1987).[14] Because it is well settled that Title VII does not require proof of overt discrimination, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); 42 U.S.C. § 2000e-2(k), the district court did not err here in failing to require proof of discriminatory intent.

III

Defendant makes two broad objections to the relief ordered by

---

[13] The Supreme Court's recent decision in *Franklin v. Gwinnett County Pub. Schs.*, 112 S. Ct. 1028, 1038 n.8 (1992), addressing the intent requirement only with respect to monetary damages for a Title IX violation, is not to the contrary.

[14] We believe, however, that Title IX and its implementing regulations offer enough guidance in setting the burden of proof that application of the Title VII model in that regard is not necessary. *See supra* part II D and nn. 5 & 8.

the district court. First, it maintains that plaintiffs have an adequate remedy at law and therefore injunctive relief is inappropriate. Second, defendant argues that it should have been afforded the opportunity to present a plan to the court that would have brought it into compliance with Title IX, rather than ordered to reinstate the softball program and required to take other specific actions with respect to its management of the team.

A

Defendant suggests for the first time on appeal that because plaintiffs have settled their damages suit, they have been made whole and injunctive relief is unnecessary. We draw no such conclusion. Plaintiffs' damages action is not before us, and we do not presume to know for what they are being compensated. However, insofar as defendant's continuing violation of Title IX operates to deprive plaintiffs of the opportunity to play softball, we believe monetary relief alone is inadequate. The district court correctly ordered an equitable remedy.

B

Defendant's second argument has more substance. Defendant contends that the district court abused its discretion by prescribing the precise manner in which it must comply with Title IX. Defendant objects to the specificity of the district court's order because it believes the district court has ordered it to maintain a softball team in perpetuity, and because it believes it is entitled to devise a plan for its own compliance. Were this a class action, there might be some power to defendant's argument that an order specifically requiring an institution to maintain a softball team goes further than is necessary to correct a violation of Title IX. *See Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 16 (1971) ("As with any equity case, the nature of the violation determines the scope of the

remedy."); *Cohen*, 1993 U.S. App. LEXIS 7912, at *56 ("Title IX does not require institutions to fund any particular number or type of athletic opportunities"). In a class action case a more appropriate remedy for violation might be to enjoin CSU's conduct of men's varsity competition until defendant presented a plan that would bring CSU into compliance with Title IX. This is, however, an action for relief to individual plaintiffs, brought in their individual capacities.

The district court's order of relief directly responds to the harms plaintiffs have sustained, and the relief they have requested, as individuals. Plaintiffs are former members of a terminated varsity program, seeking reinstatement of their team because of defendant's failure to comply with Title IX. The Supreme Court has recognized that in reaching Title IX's goal of protecting private citizens against discriminatory practices, there are situations in which "it makes little sense to impose on an individual, whose only interest is in obtaining a benefit for herself, ... the burden of demonstrating that an institution's practices are so pervasively discriminatory that a complete cutoff of federal funding is appropriate." *Cannon*, 441 U.S. at 705. This is such a situation. "The award of individual relief to a private litigant who has prosecuted her own suit is not only sensible but is also fully consistent with -- and in some cases even necessary to -- the orderly enforcement of [Title IX]." *Id.* at 705 - 06. The district court correctly provided plaintiffs with individual relief. Had the district court allowed defendant to devise its own plan for Title IX compliance, it would, in effect have been forcing plaintiffs to become unwilling representatives in a class action suit they chose not to bring.

Because this is not a class action, the broad sweep of the remedy exists only in defendant's imagination. The district court's order does not apply to Colorado high schools. It does not reach any other college or university. It does not extend the effective accommodation test to any other department of CSU. It does not even require CSU to institute women's varsity soccer or alpine skiing,

as defendant fears.[15] Only the CSU softball players have established that their athletic interests and abilities are not being accommodated effectively under Title IX. Therefore, relief is appropriate only for them. Moreover, because this relief runs to plaintiffs individually, defendant is incorrect in its assumption that CSU must sustain a softball team indefinitely. To the contrary, once all the plaintiffs in this case have transferred or graduated, defendant could return to court and seek to have the injunction dissolved. *See United States v. Swift & Co.*, 286 U.S. 106, 114 (1932) (recognizing "the power of a court of equity to modify an injunction in adaptation to changed conditions"); *Cook v. Colgate Univ.*, No. 92-9175, 1993 U.S. App. LEXIS 9695 at *6 - 7 (2d Cir. Apr. 28, 1993) (vacating as moot a district court order granting varsity status to a women's ice hockey team because all the plaintiffs would have graduated before the order took effect).

Further, because the reinstatement of the softball team is predicated upon defendant's Title IX violation, if that violation were remedied in accordance with either of the other two benchmarks of the effective accommodation test defendant would then no longer be obligated to maintain its softball program. If, for example, defendant chose to cut its athletic programs in such a way as to meet the substantial proportionality benchmark, plaintiffs would have no basis for asserting their right to play softball. The district court acknowledged this in its order: "The underlying mandate of this opinion is that CSU may not continue to operate an intercollegiate athletic program that provides a disproportionate amount of participation opportunities to male athletes where there is no evidence of continuing program expansion or effective accommodation of the

---

[15] If, as the district court suggests in dicta, *Roberts v. Colorado State University*, 814 F. Supp. 1507, 1517-18 (D. Colo. 1993), there are female soccer players and alpine skiers at CSU who are aggrieved by the lack of opportunity for varsity competition in their sports, nothing prevents them from bringing suit against defendant for failing to accommodate them effectively as well. That is not the lawsuit before us.

interests and abilities of its female students." *Roberts*, 814 F. Supp. at 1519. If defendant decided to operate CSU's athletic program in compliance with the underlying mandate of the district court's opinion, plaintiffs' entitlement to individual relief would evaporate.

Finally, we turn to the specifics of the district court's order. Defendant alleges that aspects of the injunction amount to the district court's "miscromanaging" CSU's softball program. In one respect, we agree. Under the broad sweep of Title IX, *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521 (1982), the district court has the power to ensure that the reinstated softball program receives all the incidental benefits of varsity status. Thus, we find ample support for the district court's insistence that defendant promptly hire a softball coach, *see* 34 CFR § 106.41(c)(5) (equal opportunity in athletics includes the opportunity to receive coaching), prepare a field for the softball team's use, *see id.* § 106.41(c)(7) (practice and competitive facilities), and provide equipment and uniforms, *see id.* § 106.41(c)(2) (equipment and supplies). The district court also emphasized that defendant must recruit members for its reinstated team, although it did not require defendant to offer scholarships to new recruits. Clearly the district court was concerned that reinstatement of the softball team was not to be done "in a slipshod manner." Appellant's App. at 97. However, insofar as recruiting is integral to team development, it is a core coaching function. Under the Title IX regulations, defendant would not be permitted to hobble a coach's efforts to improve his or her team. Because the district court clearly did not order defendant to offer scholarships, we interpret its order regarding recruiting as part and parcel of its order to hire a coach. Any suggestion that this coach must recruit "top flight varsity players," *id.* at 98, is merely precatory.

The district court did exceed its authority in demanding that the softball team play a fall 1993 exhibition season. The district court's apparent rationale for ordering a fall season, which had not previously been a regular practice at CSU, was to ensure that CSU would be able to field a "competitive" team the following spring. *See id.* at 80

("If you don't have [a] fall of '93 season, I don't see how you're going to have a competitive team in '94"). Nothing in Title IX requires an institution to create a "top flight" varsity team, *see id.* at 97, nor is it within the district court's power, once it reinstates the softball program with all the incidental benefits of varsity status, "to make sure they have a good season." *Id.* Because a fall season is not required to effect the appropriate remedy, we hold that the district court overstepped its authority in ordering it. *See Milliken v. Bradley*, 433 U.S. 267, 282 (1977) ("federal-court decrees exceed appropriate limits if they are aimed at eliminating a condition that does not violate the Constitution or does not flow from such a violation").

The decision of the district court is AFFIRMED in part and REVERSED in part. The cause is REMANDED with instructions that the injunction be modified consistent with this opinion.

APPENDIX D

March 8, 1989

RE: 08836004

Dr. Philip E. Austin
President
Colorado State University
102 Administrative Bldg.
Fort Collins, Colorado 80523

Dear Dr. Austin:

The Office for Civil Rights (OCR) has completed its review of your progress report and the compliance summary received February 16, 1989. This submission indicates that the University has taken specific steps to meet the commitment regarding financial assistance as set out in the Corrective Action Plan.

Specifically, the University is eliminating men's baseball and women's golf and tennis. The resources from the elimination of these sports will be reallocated to women's sports which will allow for: full financial assistance in the remaining women's sports; alteration of the baseball facility for softball which should aid the women's softball team; and appropriate increases in recruiting.

OCR recognizes that the decision regarding the University's commitment to achieve proportionate distribution of student financial assistance was difficult to make. It can, however, be added to the many changes and enhancements evidenced in its intercollegiate program of which the University can be proud. These include:

-- Enhancement of appointments for coaches of women's sports; appointment of assistants to these coaches. The compensation

for these coaches have been increased and are now more competitive with peer positions.

-- Increasing the recruiting base budgets for women's sports.

-- Proportionality has been reached in trade-outs for women's sports.

-- Recruiting activities are governed equally.

-- The Intercollegiate Athletic Department sports information operation services the needs of all sports programs and student athletes.

-- There is equality in the academic tutoring for all student athletes and for the compensation of tutors.

-- The hiring of a central facilities scheduling coordinator and the assignment of a facility scheduling coordinator for each building to resolve scheduling conflicts.

-- The Business Office, training room, equipment room, laundry, sports information, academic counseling, and supply room are jointly operated for men's and women's sports. All have equal access to typewriters, word processors and computer equipment.

In addition, the University has constructed a varsity weight room and hired a full-time strength coach. The facility is open to all varsity student athletes and is scheduled and supervised by the strength coach and two part-time students.

The University continues in its commitment to accommodate the interests and abilities of members of both sexes but informs OCR that it recognizes that the goal as set forth in its Corrective Action Plan is unattainable. In the letter dated February 10, 1989, valid

nondiscriminatory reasons for not meeting the stated goals have been provided. In addition, accomplishments by the University since OCR's review are substantive and adequately address the cited deficiencies.

This office has a genuine respect for the efforts of the University and commends its Title IX Committee and Department of Athletics for the commitment that ultimately achieved compliance with Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 and 1682, and its implementing regulation, 34 CFR Part 106. Because the University continues to demonstrate good faith efforts to increase athletic opportunities for female student athletes, we are terminating our monitoring procedures effective the date of this letter.

We appreciate your efforts and that of your staff in facilitating compliance. If you have any questions, please call me at (303) 844-5695 or your representative may call Mr. Ramon F. Villarreal, Director, Compliance Enforcement Division at (303) 844-2991.

Sincerely,

Gilbert D. Roman, Ed. D.
Regional Director

cc: Mr. Brian Snow
Office for the State University Systems